DOCKET

No. 08-22
Title: Hugh M. Caperton, et al., Petitioners
v.
A.T. Massey Coal Company, Inc., et al.
Docketed: July 3, 2008
Lower Ct: Supreme Court of Appeals of West Virginia
Case Nos.: (33350)
Decision Date: April 3, 2008
Questions Presented

----Date----	~~~~~~~~Proceedings and Orders~~~~~~~~
Jul 2 2008	Petition for a writ of certiorari filed. (Response due August 4, 2008)
Jul 14 2008	Consent to the filing of any amicus briefs received from the counsel for the petitioners.
Jul 22 2008	Order extending time to file response to petition to and including September 3, 2008.
Aug 1 2008	Brief amicus curiae of Public Citizen filed.
Aug 1 2008	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed.
Aug 4 2008	Brief amicus curiae of Washington Appellate Lawyers Association filed.
Aug 4 2008	Brief amicus curiae of American Bar Association filed.
Aug 4 2008	Brief amicus curiae of Committee for Economic Development filed.
Aug 15 2008	Supplemental brief of petitioners Hugh M. Caperton, et al. filed.
Sep 3 2008	Brief of respondents A.T. Massey Coal Company, Inc., et al. in opposition filed.
Sep 16 2008	Reply of petitioners Hugh M. Caperton, et al. filed. (Distributed)
Sep 17 2008	DISTRIBUTED for Conference of October 10, 2008.
Oct 14 2008	DISTRIBUTED for Conference of October 17, 2008.
Oct 27 2008	DISTRIBUTED for Conference of October 31, 2008.
Nov 3 2008	DISTRIBUTED for Conference of November 7, 2008.
Nov 10 2008	DISTRIBUTED for Conference of November 14, 2008.
Nov 14 2008	Petition GRANTED.
Dec 3 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioners.
Dec 8 2008	SET FOR ARGUMENT ON Tuesday, March 3, 2009.
Dec 17 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent.
Dec 29 2008	Joint appendix filed (two volumes.) (Statement of costs filed)
Dec 29 2008	Brief of petitioners Hugh M. Caperton, et al. filed.
Jan 2 2009	Brief amici curiae of 27 Former Chief Justices and Justices filed.
Jan 2 2009	Brief amicus curiae of Public Citizen filed.
Jan 5 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 5 2009	Brief amici curiae of Conference of Chief Justices in Support of Neither Party filed.
Jan 5 2009	Brief amicus curiae of American Association for Justice filed.
Jan 5 2009	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed.
Jan 5 2009	Brief amici curiae of Justice at Stake, et al. filed.
Jan 5 2009	Brief amicus curiae of American Bar Association filed.

Jan 5 2009	Brief amici curiae of Center for Political Accountability, et al. filed.
Jan 5 2009	Brief amicus curiae of American Academy of Appellate Lawyers filed.
Jan 5 2009	Brief amici curiae of Committee for Economic Development, et al. filed.
Jan 9 2009	CIRCULATED.
Jan 27 2009	Record received from the Supreme Court of Appeals of West Virginia. (13 boxes)
Jan 28 2009	Brief of respondents A.T. Massey Coal Company, Inc., et al. filed. (Distributed)
Feb 4 2009	Brief amicus curiae of James Madison Center for Free Speech filed. (Distributed)
Feb 4 2009	Brief amicus curiae of Center for Competitive Politics filed. (Distributed)
Feb 4 2009	Brief amici curiae of Ronald D. Rotunda, and Michael R. Dimino filed. (Distributed)
Feb 4 2009	Brief amici curiae of Alabama, et al. filed. (Distributed)
Feb 4 2009	Brief amici curiae of Ten Current and Former State Chief Justices and Justices filed. (Distributed)
Feb 4 2009	Motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 9 2009	Motion for leave to file amicus brief out of time filed by Supreme Court of the State of Louisiana in support of neither party. (Distributed)
Feb 20 2009	Motion of Alabama, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Feb 20 2009	Motion for leave to file amicus brief filed by out of time Supreme Court of the State of Louisiana in support of neither party GRANTED.
Feb 24 2009	Reply of petitioners Hugh M. Caperton, et al. filed. (Distributed)
Mar 3 2009	Argued. For petitioners: Theodore B. Olson, Washington, D.C. For respondents: Andrew L. Frey, New York, N.Y.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioners:		
Theodore B. Olson Counsel of Record	Gibson Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036 TOlson@gibsondunn.com	(202) 955-8500
Party name: Hugh M. Caperton, et al.		
Attorneys for Respondents:		
Andrew L. Frey Counsel of Record	Mayer, Brown LLP 1675 Broadway New York, NY 10019 afrey@mayerbrown.com	(212) 506-2500
Party name: A.T. Massey Coal Company, Inc., et al		
C. Thomas Ludden	Lipson Neilson Cole Seltzer & Garin, PC 3910 Telegraph Road, Suite 200 Bloomfield Hills, MI 48302	(248)-593-5000

	tludden@lipsonneilson.com	

Party name: Ronald D. Rotunda, and Michael R. Dimino

Lewis F. Powell III	Hunton & Williams LLP 951 E. Byrd Street Richmond, VA 23219	(804) 788-8200

Other:

James Bopp Jr.	Bopp, Coleson & Bostrom 1 South Sixth Street Terre Haute, IN 47807-3510 jboppjr@aol.com	(812) 232-2434

Party name: James Madison Center for Free Speech

Esmond Phelps Gay	Christovich & Kearney LLP 601 Poydras Street, Suite 2300 New Orleans, LA 70130-6078 epgay@christovich.com	(504)-561-5700

Party name: Supreme Court of the State of Louisiana in support of neither party

Pamela Harris	O'Melveny & Myers LLP 1625 Eye Street, N. W. Washington, DC 20006-4001 pharris@omm.com	(202) 383-5300

Party name: National Association of Criminal Defense Lawyers

Stephen M. Hoersting	Center for Competitive Politics 124 S. West Street Suite 201 Alexandria, VA 22314 Hoersting@gmail.com	(703) 894-6800

Party name: Center for Competitive Politics

Aziz Huq	Brennan School for Justice at New York University School of Law 161 Avenue of the Americas, 12th Floor New York, NY 10013	(212) 998-6730

Party name: Brennan Center for Justice at NYU School of Law, et al

Daniel F Kolb	Davis Polk & Wardwell 450 Lexington Ave New York, NY 10017	(212) 450-4000

Party name: Committee for Economic Development

Wendy Cole Lascher	Lascher & Lascher 605 Poli Street Ventura, CA 93001	(805) 648-3228

Party name: American Academy of Appellate Lawyers

William H Neukom	American Bar Association 321 North Clark Street Chicago, IL 60610	(312) 988-5000

Party name: American Bar Association

Kevin C. Newsom	Bradley Arant Rose & White LLP One Federal Place 1819 Fifth Avenue North Birmingham, AL 35203-2119 knewsom@bradleyarant.com	(205) 521-8000

Party name: Alabama, et al.

Robert S. Peck	Center for Constitutional Litigation, P.C. 777 6th Street, NW, Suite 520 Washington, DC 20001-3723 robert peck@cclfirm.com	(202) 944-2874

Party name: American Association for Justice

Thomas R. Phillips	Baker Botts LLP 1500 San Jacinto Center 98 San Jacinto Boulevard Austin, TX 78701	(512)-322-2565

Party name: Conference of Chief Justices in Support of Neither Party

James J. Sample	Brennan Center for Justice ar NYU School of Law 161 Avenue of the Americas 12th Floor New York, NY 10013	(212) 998-6703

Party name: Brennan Center for Justice at NYU School of Law, et al

Karl J. Sandstrom	Perkins Coie LLP 607 14th Street NW 8th Floor Washington, DC 20005 ksandstrom@perkinscoie.com	(202)-628-6600

Party name: Center for Political Accountability, et al.

H. Thomas Wells Jr. | President
American Bar Association
321 N. Clark Street
Chicago, IL 60654 | 31219885000

Party name: American Bar Association

Charles K. Wiggins | Wiggins & Masters PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110 | (206) 780-5033

Party name: 27 Former Chief Justices and Justices

Patrick J. Wright | 140 West Main Street
Midland, MI 48640 | (989)-631-0900

Party name: Ten Current and Former State Chief Justices and Justices

Elizabeth B. Wydra | Constitutional Accountability Center
1301 Connecticut Ave., NW
Suite 502
Washington, DC 20036 | (202) 296-6889

Party name: Justice at Stake, et al.

Allison M. Zieve | Public Citizen Litigation Group
1600 20th St., NW
Washington, DC 20009
azieve@citizen.org | (202) 588-7723

Party name: Public Citizen

PETITION FOR WRIT OF CERTIORARI

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No.

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

QUESTION PRESENTED

Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court—more than 60% of the *total* amount spent to support Justice Benjamin's campaign—while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., were defendants-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Sovereign Coal Sales, Inc., and Harman Mining Corporation are wholly-owned subsidiaries of Harman Development Corporation. Harman Development Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 WL 918444. Pet. App. 1a. Justice Benjamin's orders declining to recuse himself are not reported. *Id.* at 148a, 152a, 157a.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords the Court the opportunity to clarify the

circumstances in which a litigant's expenditures on a judicial election campaign create an "appearance of bias" that is so significant that due process requires the recusal of the judge who benefited from those expenditures—a question that is vitally important to preserving the "reputation for impartiality and nonpartisanship"—and, ultimately, the "legitimacy"—"of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

Mr. Don L. Blankenship, chairman, CEO, and president of respondent A.T. Massey Coal Co. ("Massey"), spent $3 million supporting the 2004 campaign of Justice Brent Benjamin for a seat on the Supreme Court of Appeals of West Virginia. Mr. Blankenship spent that extraordinary sum of money—which represents more than sixty percent of the total amount spent supporting Justice Benjamin's campaign—while Massey was preparing to appeal a $50 million fraud verdict to the West Virginia Supreme Court of Appeals. After Justice Benjamin won the election and took his seat on that court, petitioners requested that Justice Benjamin recuse himself from Massey's appeal due to the unavoidable appearance of impropriety generated by Mr. Blankenship's multimillion-dollar campaign expenditures. Justice Benjamin refused to recuse himself, and then voted with the court's majority to overturn the verdict against Massey by a 3-2 vote.

Petitioners renewed their recusal motion after photographs were made public showing the chief justice of the West Virginia Supreme Court of Appeals vacationing with Mr. Blankenship on the French Riviera while Massey's appeal was pending. Although the chief justice and another justice subsequently recused themselves and the court granted rehearing, Justice Benjamin—who then became the

acting chief justice—again refused to recuse himself, appointed two replacement justices, and again cast the deciding vote in the court's 3-2 decision overturning the verdict against Massey.

This Court's review of Justice Benjamin's insistence on participating in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal of a judge who has benefited from a litigant's substantial campaign contributions and to restore public confidence in the judicial systems of the thirty-nine States that elect their judges. The $3 million that Mr. Blankenship spent supporting Justice Benjamin's campaign while planning to pursue an appeal to the West Virginia Supreme Court of Appeals created a constitutionally unacceptable appearance of impropriety that required Justice Benjamin to recuse himself from the court's consideration of Massey's appeal. His failure to do so conflicts with the constitutional recusal standards articulated by this Court and other lower courts, denied petitioners their due process rights, and substantially undermined the integrity and reputation of the West Virginia judicial system.

1. Massey is one of the Nation's largest coal companies. Until the corporate petitioners were forced into bankruptcy by Massey's fraudulent business practices, they competed with Massey through the production of coal at the Harman Mine in Virginia. Pet. App. 4a.

This case arose out of Massey's efforts to obtain the business of LTV Steel ("LTV"), one of the principal purchasers of petitioners' coal. LTV repeatedly refused to purchase Massey's coal because it "was inferior in quality to the coal obtained from the Har-

man Mine." Pet. App. 7a n.11. In an effort to secure LTV's business, Massey purchased the parent of Wellmore Coal Corporation ("Wellmore"), which was the sole direct purchaser of petitioners' coal and which resold that coal to LTV. *Id.* at 8a. "Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV." *Id.* LTV, however, refused to accept the substitution of Massey coal for Harman coal and severed its business relationship with Wellmore. *Id.*

In response, Wellmore, "at Massey's direction," invoked the *force majeure* clause in its coal supply agreement with petitioners Sovereign Coal Sales, Inc., and Harman Mining Corporation—a provision that excused nonperformance due to "acts of God, acts of the public enemy, epidemics," and other "causes reasonably beyond the control" of the parties—and drastically reduced the amount of coal that it agreed to purchase from petitioners. Pet. App. 5a n.8, 9a. As the trial court found, "Massey knew" that this "declaration" "would put [petitioners] out of business." *Id.* at 9a. Indeed, "Massey delayed Wellmore's termination of [the] contract until late in the year, knowing it would be virtually impossible for [petitioners] to find alternate buyers for [their] coal at that point in time." *Id.* at 10a.

Massey simultaneously entered into negotiations with petitioners to purchase the Harman Mine. Pet. App. 9a. The trial court found that Massey "utilized the confidential information it had obtained" from petitioners during these negotiations "to take further actions"—including the purchase of a narrow band of coal reserves surrounding the entire Harman Mine—"in order to make the Harman Mine unattractive to others and thereby decrease its value." *Id.* at 10a-11a. Massey then "delayed" consummation of its

agreement to purchase the Harman Mine and "ultimately collapsed the transaction in such a manner so as to increase [petitioners'] financial distress." *Id.* at 10a (internal quotation marks omitted). Left without a purchaser for either their coal or their mining facilities, the corporate petitioners were compelled to cease operations and file for bankruptcy. *Id.* at 11a.

2. In 1998, petitioners filed suit against Massey and several affiliated companies in the Circuit Court of Boone County, West Virginia, to recover damages attributable to Massey's unlawful interference with petitioners' business relations and Massey's fraudulent conduct during its negotiations to purchase the Harman Mine. Pet. App. 11a-12a. After a lengthy trial that included extensive testimony from Don L. Blankenship, president, CEO, and chairman of Massey, the jury returned a verdict in August 2002 that found Massey liable for tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment, and awarded petitioners more than $50 million in compensatory and punitive damages. *Id.* at 13a. Mr. Blankenship immediately vowed that Massey would appeal the verdict. Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 5.

3. Due to a lengthy delay in the trial court's consideration of post-trial motions and in the production of the trial transcript, Massey did not file a petition for review of the trial court's judgment in the West Virginia Supreme Court of Appeals—the sole appellate court in the State—until October 24, 2006.

In the time between the 2002 verdict and Massey's 2006 petition for review, the composition of the West Virginia Supreme Court of Appeals was al-

tered by lawyer Brent Benjamin's 2004 electoral victory over incumbent Justice Warren McGraw. That judicial election was described by observers as one of the "nastiest" in the Nation that year. Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, Wash. Post, Nov. 4, 2004, at A15; *see also* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, at A1.

Mr. Blankenship played a significant—and very public—role in that election. Indeed, the $3 million that he spent to support Justice Benjamin's campaign was more than the *total* amount spent by all other Benjamin supporters combined and was likely more than any other individual spent on a judicial election that year. *See infra* note 2.

Most of Mr. Blankenship's campaign expenditures were made through And For The Sake Of The Kids, a so-called "527 organization" that, according to Mr. Blankenship, was formed after the verdict in this case for the purpose of "beat[ing] Warren McGraw," the incumbent justice against whom Brent Benjamin was running, and that was "named for its belief that McGraw's policies [were] bad for children and their future." Tom Diana, *W. Va. Coal Executive Works to Oust McGraw*, Wheeling News-Register, Oct. 25, 2004; Brad McElhinny, *Big-Bucks Backer Felt He Had to Try*, Charleston Daily Mail, Oct. 25, 2004, at 1A. By the time of the election, Mr. Blankenship had donated $2,460,500 to And For The Sake Of The Kids—more than two-thirds of the total funds raised by the organization. Disqual. Mtn. Ex. 11.[1]

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[1] Nationally, only four political groups directly involved in state elections in 2004 outraised And For The Sake Of The

And For The Sake Of The Kids used most of these funds to run campaign advertisements, including a series of television ads that accused Justice McGraw of voting to release an incarcerated child molester and to permit him to work in a high school. *See* Deborah Goldberg et al., *The New Politics of Judicial Elections* 4-5 (2004) (describing one of these ads, which stated, "Letting a child rapist go free? To work in our schools? That's radical Supreme Court Justice Warren McGraw. Warren McGraw—too soft on crime. Too dangerous for our kids.").

In addition to the nearly $2.5 million that Mr. Blankenship donated to And For The Sake Of The Kids, he spent another $517,707 in direct support of the Benjamin campaign, mostly through payments to media outlets for television and newspaper advertisements. Disqual. Mtn. Exs. 18, 24. The $3 million that Mr. Blankenship spent to support Justice Benjamin's campaign through donations to And For The Sake Of The Kids and through direct expenditures is $1 million more than the total amount spent by all of Justice Benjamin's other campaign supporters and three times the amount spent by Justice Benjamin's own campaign committee.[2]

[Footnote continued from previous page]

Kids: the Republican Governors Association, the Democratic Governors Association, the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee. Disqual. Mtn. Ex. 17.

[2] A total of $4,986,711 was spent on Justice Benjamin's 2004 campaign: $3,623,500 by And For The Sake Of The Kids (Disqual. Mtn. Ex. 17), $845,504 by the Benjamin for Supreme Court Committee (*id.* Ex. 31), and $517,707 by Mr. Blankenship through direct expenditures (*id.* Exs. 18, 24).

Mr. Blankenship also worked to solicit funds on behalf of Justice Benjamin's campaign. Most notably, he widely distributed letters exhorting doctors to support Justice Benjamin in order to lower their malpractice premiums and "get rid of a judge . . . who let a rapist of children out of jail." Disqual. Mtn. Ex. 14. Mr. Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

Mr. Blankenship's significant efforts on behalf of the Benjamin campaign attracted scrutiny from both state and national media outlets. *See, e.g.*, Liptak, *supra*; Toby Coleman, *Coal Companies Provide Big Campaign Bucks*, Charleston Gazette, Oct. 15, 2004, at 1A. Indeed, a number of observers openly questioned the motives behind Mr. Blankenship's extraordinary campaign expenditures at a time when Massey was preparing to appeal a $50 million verdict to the state supreme court. *See, e.g.*, William Kistner, *Justice for Sale*, American RadioWorks (2005), *at* http://americanradioworks.publicradio.org/features/judges/ ("One of [Justice Benjamin's] major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge."); Edward Peeks, Editorial, *How Does Political Cash Help Uninsured?*, Charleston Gazette, Nov. 9, 2004, at 2D ("[T]hese voices raise the question of vote buying to a new high in politics.").

The $3 million that Mr. Blankenship spent to support the Benjamin campaign bore fruit: Justice Benjamin defeated Justice McGraw in the November 2004 election and was sworn in as a justice of the

West Virginia Supreme Court of Appeals in January 2005.

4. Before Massey filed its petition in the West Virginia Supreme Court of Appeals seeking review of the $50 million judgment against it, petitioners filed a motion requesting that Justice Benjamin recuse himself from participation in Massey's forthcoming appeal. In accordance with the West Virginia Rules of Appellate Procedure, the motion was directed solely to Justice Benjamin, and his decision was not subject to review by any other member of the court. *See* W. Va. R. App. P. 29.

In their recusal motion, petitioners argued that federal due process required Justice Benjamin to recuse himself from participation in Massey's appeal because Mr. Blankenship's extraordinary financial support for Justice Benjamin's campaign created a constitutionally unacceptable appearance of impropriety. *See* Disqual. Mtn. 3 ("The principle of Due Process requires that where such a shadow is cast over the objectivity of a member of the judiciary, so much so that the public would lose confidence in the fairness of the government, a justice should disqualify himself . . . ."); *see also* Corporate Appellees' Resp. Br. 30 (Feb. 25, 2008) ("Justice Benjamin's refusal to recognize that his participation in this case presents a well-recognized, widely commented upon appearance of impropriety, constitutes a violation of the Fourteenth Amendment of the United States Constitution.").[3]

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[3] Massey did not file a response to any of petitioners' motions to recuse Justice Benjamin. Indeed, at the same time that petitioners were seeking the recusal of Justice Benjamin, Massey was seeking the recusal of Justice Starcher on the ground that he had made public statements critical of Mr. Blankenship's

In an April 7, 2006, memorandum, Justice Benjamin declined to recuse himself, writing that "no objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case." Pet. App. 149a.

The West Virginia Supreme Court of Appeals thereafter granted Massey's petition for review. In a 3-2 decision, the court reversed the $50 million verdict against Massey and dismissed the case with prejudice—while "mak[ing] perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered" against it. *Caperton v. A.T. Massey Coal Co.*, 2007 W. Va. LEXIS 119, at *22-23 (Nov. 21, 2007). Justice Benjamin joined the majority's opinion reversing the verdict against Massey.

Creating numerous new points of West Virginia law, the majority held that petitioners' suit against Massey was barred by a forum-selection clause in the coal supply agreement that Sovereign Coal Sales, Inc., and Harman Mining Corporation had entered into with Wellmore, which provided that "[a]ll actions brought in connection with this Agreement

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involvement in the 2004 election. After Justice Starcher initially refused to recuse himself, Massey filed suit against the West Virginia Supreme Court of Appeals in federal court alleging that the court's recusal procedures violate federal due process because they do not provide a means for the full court to review a justice's decision not to recuse himself. *See Massey Energy Co. v. W. Va. Supreme Court of Appeals*, No. 06-0614 (S.D. W. Va. filed Aug. 8, 2006). That suit remains pending.

shall be filed in and decided by the Circuit Court of Buchanan County, Virginia." *Caperton*, 2007 W. Va. LEXIS 119, at *23. The majority reached this conclusion even though it acknowledged that neither Massey itself nor two of the petitioners—Harman Development Corporation and Mr. Hugh Caperton—were parties to the agreement and that the causes of action on which petitioners prevailed sounded in tort, rather than contract. *Id.* at *42, *53.

The majority further held, in the alternative, that petitioners' suit was foreclosed by principles of res judicata because Sovereign Coal Sales and Harman Mining had obtained a breach-of-contract verdict against Wellmore in a Virginia state court based on Wellmore's improper invocation of the *force majeure* clause in the coal supply agreement. *Caperton*, 2007 W. Va. LEXIS 119, at *67. In so holding, the majority disregarded the fact that Massey, Harman Development, and Mr. Caperton were not parties to the Virginia action; that the Virginia action involved breach-of-contract, not fraud, claims; that the cases involved vastly different issues and evidence; and that the Virginia action had been on appeal, and was thus nonfinal for res judicata purposes, at the time Massey moved in the trial court to dismiss petitioners' suit on res judicata grounds. *Id.* at *69, *78, *88.

Justices Albright and Starcher filed vigorous dissents. Both expressed alarm at the "result-driven effort" of the majority to relieve Massey of liability. *Caperton*, 2007 W. Va. LEXIS 119, at *93-94; *see also id.* at *105. Justice Albright described the majority opinion as "a convoluted discussion . . . to hide the fact that it molds the law to attain the desired result." *Id.* at *95. According to Justice Albright, the majority "went out of its way to make findings that fit its intended result" and did so "by twisting logic,

misapplying the law and introducing sweeping 'new law' into our jurisprudence." *Id.* at *101, *104 (emphasis omitted).

Petitioners timely petitioned for rehearing. While that petition was pending, photographs were made public showing Chief Justice Maynard, who had joined the majority's opinion in favor of Massey, vacationing with Mr. Blankenship on the French Riviera during the pendency of Massey's appeal. *See* Paul J. Nyden, *Coal Operator Says Photos Show Maynard Should Not Hear Appeal*, Charleston Gazette, Jan. 15, 2008, at 1A. Petitioners promptly moved for the recusal of Chief Justice Maynard based on the appearance of impropriety generated by his ill-timed vacation with Mr. Blankenship. Petitioners simultaneously renewed their request that Justice Benjamin recuse himself based on the equally strong appearance of impropriety created by Mr. Blankenship's substantial expenditures supporting Justice Benjamin's 2004 campaign.

Chief Justice Maynard recused himself from further participation in the case. Justice Benjamin, however, again refused to do so (Pet. App. 152a)—notwithstanding widespread public demands that he step aside from the case in order to restore the perception of an impartial and unbiased judiciary in West Virginia. *See, e.g.*, Editorial, *Bravo*, Charleston Gazette, Feb. 16, 2008, at 4A ("Benjamin remains the only Massey-connected justice still presiding over Massey cases. Clearly, for the sake of impartiality, he should . . . recus[e] himself from all Massey cases."); Editorial, *Finally*, Register Herald (Beckley, W. Va.), Feb. 18, 2008 ("Benjamin clearly was aided by Blankenship's multi-million dollar campaign against incumbent Warren McGraw and even[ ] though the justice has stated unequivocally he isn't

influenced by Blankenship, it just doesn't look good."); Editorial, *Perception That Justice Can Be Bought Harms the Judiciary*, Sunday Gazette Mail (Charleston), Mar. 2, 2008, at 3C ("It is time to say publicly what attorneys across the state are saying privately: Justice Brent Benjamin needs to . . . step down from hearing cases involving Massey Energy and its subsidiaries. His continued involvement in Massey litigation endangers the public perception of the integrity of the Supreme Court of Appeals.").

Justice Benjamin, as the justice next in line for the court's rotating chief justiceship, selected a state circuit court judge to replace Chief Justice Maynard. The reconstituted court granted petitioners' petition for rehearing and set the case for reargument.[4]

Shortly thereafter, Justice Starcher recused himself from further participation in the case due to the perception created by his public statements criticizing Mr. Blankenship's role in Justice Benjamin's campaign. In his recusal order, Justice Starcher urged Justice Benjamin also to step aside from the case, asserting that Mr. Blankenship's extraordinary campaign expenditures gave rise to "the very defini-

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[4] Under established seniority and rotation procedures followed by the West Virginia Supreme Court of Appeals for twenty-eight years, Justice Albright, not Justice Benjamin, would have been next in line for the court's rotating chief justiceship and would have appointed a replacement for Chief Justice Maynard. *See* Paul J. Nyden, *Albright Passed over for Chief Justice*, Charleston Gazette, Nov. 23, 2007, at 1A. Justice Benjamin secured this authority, however, when Chief Justice Maynard, Justice Davis, and Justice Benjamin—the three justices who formed the majority in the first opinion in favor of Massey—voted to disregard those long-standing procedures and to move Justice Benjamin ahead of Justice Albright in the order of succession to the chief justiceship. *Id.*

tion of 'appearance of impropriety'" and "have far more egregiously tainted the perceived impartiality of this Court than any statement" he had made about Mr. Blankenship. Starcher Recusal Order 3, 7. Justice Starcher suggested that "a serious read of the United States Supreme Court case, *Aetna Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)"—which held that due process requires recusal when the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true" (*id.* at 822 (alterations in original; internal quotation marks omitted))—"is in order before . . . a decision is made" by Justice Benjamin concerning his further participation in the case. Starcher Recusal Order 9-10.

In his second order refusing to recuse himself, Justice Benjamin had stated that recusal "is appropriate only when . . . the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality." Pet. App. 154a. Because, as Justice Starcher observed in his recusal order (at 7), "hardly a soul . . . could believe that a justice who" benefited to the extent that Justice Benjamin did "from a litigant could rule fairly on cases involving that litigant," petitioners submitted a third recusal motion to Justice Benjamin accompanied by survey results indicating that 67% of West Virginians doubted his ability to be fair and impartial in deciding Massey's appeal. Justice Benjamin nevertheless again refused to recuse himself, declaring that the results were "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." Pet. App. 158a.

That same day, the West Virginia Supreme Court of Appeals—which now included two circuit court judges appointed by Justice Benjamin to re-

place Chief Justice Maynard and Justice Starcher—issued its opinion on rehearing, and again reversed the judgment against Massey by a 3-2 vote. Justice Benjamin joined the majority opinion (Pet. App. 95a), which relied on the same legally dubious forum-selection clause and res judicata grounds as the court's earlier decision in favor of Massey.

Justice Albright, now joined by Circuit Judge Cookman, strenuously dissented, contending that "the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions." Pet. App. 146a. The dissenting opinion meticulously critiqued the factual findings and new points of law fashioned "to achieve the result desired by the majority." *Id.* at 97a. "Not only is the majority opinion unsupported by the facts and existing case law," Justice Albright concluded, "but it is also fundamentally unfair." *Id.* at 146a.

In addition to their disagreement with the majority's forum-selection clause and res judicata analysis, the dissenters also explained that they were "unable to stand silent" regarding Justice Benjamin's failure to recuse himself. Pet. App. 146a n.16 (Albright, J., dissenting). "Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955)," the dissenters wrote, "it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." Pet. App. 146a n.16 (Albright, J., dissenting). "It is now clear, especially from the last motion for disqualification filed in this case," they continued, "that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify the circumstances in which due process requires the recusal of an elected judge who has benefited from a litigant's substantial campaign expenditures—an issue with profound ramifications for the Due Process Clause's guarantee of judicial neutrality and for the legitimacy of state judicial systems across the Nation.

Justice Benjamin's conclusion that he could participate in this case consistent with the requirements of due process cannot be squared with this Court's repeated admonition that, in order to foreclose the possibility of *actual* judicial bias, a judge "must avoid even the *appearance* of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added). A constitutionally unacceptable appearance of bias exists, for example, where a judge criminally charges a defendant with contempt and then presides over the contempt proceedings (*In re Murchison*, 349 U.S. 133, 136 (1955)) and where a judge decides a legal issue that has a direct impact on the outcome of his own lawsuit. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). An equally unacceptable appearance of bias was generated when Massey's CEO spent $3 million supporting Justice Benjamin's candidacy for a seat on the state supreme court—an amount that represents more than sixty percent of the total expenditures supporting the campaign—and solicited additional contributions from other donors. Because of the substantial risk of actual bias created by Mr. Blankenship's extraordinary level of financial support for Justice Benjamin's campaign (which was provided to Justice Benjamin while this case was heading on appeal to the West Virginia Supreme Court of Appeals), the Constitu-

tion required Justice Benjamin to recuse himself from Massey's appeal.

Justice Benjamin's insistence on participating in this case therefore conflicts with this Court's decisions specifying the circumstances in which due process requires recusal. It also deepens a three-way division among the lower courts regarding the due process standard governing recusal determinations and is squarely at odds with a decision of the Supreme Court of Oklahoma holding that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001).

Although judicial elections—and contributions to elected judges—are a well-established means of selecting a state judiciary, there will be rare cases where campaign expenditures by a litigant create a constitutionally unacceptable appearance of impropriety. This is such a case—and it affords the Court an ideal opportunity both to clarify the circumstances in which due process mandates recusal and to restore the public's waning confidence in state judicial systems in the face of the increasingly significant role of campaign contributions in state judicial elections.

I. JUSTICE BENJAMIN'S REFUSAL TO RECUSE HIMSELF CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENT.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Mon-*

roeville, 409 U.S. 57, 62 (1972). Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety. *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

Because Mr. Blankenship's extraordinary level of support for Justice Benjamin's campaign generated the unavoidable—and constitutionally impermissible—appearance that Justice Benjamin was biased in favor of Massey, Justice Benjamin's refusal to recuse himself from Massey's appeal conflicts with this Court's decisions specifying the circumstances in which due process requires recusal.

A. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). Accordingly, in *Murchison*, the Court held that it violated due process for a judge who acted as a "one-man judge-grand jury" to charge a witness with contempt in grand jury proceedings and then convict the defendant of that charge because, having been part of the accusatory process that culminated in the contempt charge, it was improbable that the judge could be "wholly disinterested" in the outcome of the contempt proceedings. *Id.* at 137.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been

subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of evidence of actual bias on the part of the judge, the Court concluded that recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him").

And, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that it violated due process for a state supreme court justice to participate in the court's review of a verdict for bad-faith refusal to pay an insurance claim because the justice was at that time pursuing his own bad-faith suit against an insurance company and the legal principles established by the supreme court's decision had a direct impact on the outcome of the justice's own case. *Id.* at 825. The Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Justice Embry's ongoing pursuit of monetary damages through a cause of action identical to the one pending before the state supreme court offered just such a "temptation."

B. The appearance of impropriety created by the $3 million that Mr. Blankenship spent on Justice Benjamin's campaign is at least as strong as the ap-

pearance of impropriety in *Murchison*, *Mayberry*, and *Lavoie*. Indeed, just as it is human nature for a judge to be biased *against* a criminal defendant whom he has charged with committing contempt or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party whose CEO facilitated his election to the bench through massive campaign expenditures that were larger than the combined amount spent on the judge's campaign by all other supporters. *See Republican Party v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge operates under a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising issues identical to the case pending before him, such a "temptation" is equally acute where the judge is beholden to the CEO of a defendant corporation for the majority of the funds expended in support of his recent campaign for office—and where casting an outcome-determinative vote against the corporation in a multimillion-dollar case may foreclose the possibility of similar financial support when the judge seeks reelection.[5]

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[5] This Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Accordingly, it was inconsistent with due process, for example, for a village mayor to preside over a hearing for violation of a village ordinance where the mayor was responsible for the village's finances, which depended to a significant extent

The circumstances surrounding Justice Benjamin's election to the bench therefore "create[d]" a constitutionally intolerable "appearance of bias" (*Peters*, 407 U.S. at 502) that required Justice Benjamin to step aside from consideration of Massey's appeal. Certiorari is warranted to reconcile Justice Benjamin's insistence on participating in this case with the requirements established by this Court's due process jurisprudence.

II. JUSTICE BENJAMIN'S REFUSAL TO RECUSE HIMSELF DEEPENS AN EXISTING CONFLICT AMONG THE LOWER COURTS REGARDING THE CIRCUMSTANCES IN WHICH RECUSAL IS CONSTITUTIONALLY REQUIRED.

Although this Court has repeatedly recognized that "[t]rial before 'an unbiased judge' is essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)), lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations—a conflict that extends to the campaign contribution setting implicated in this case.

To be sure, numerous lower courts have faithfully applied this Court's decisions holding that due

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upon the fines levied in such proceedings. *Ward*, 409 U.S. at 60. The Court explained that the procedure provided the mayor with a financial incentive to rule against the defendant and therefore denied the defendant "a neutral and detached judge." *Id.* at 62. Although such a direct, pecuniary interest is not necessary to establish that a judge's participation in a case violated due process, Mr. Blankenship's expenditures on Justice Benjamin's campaign were so significant that they implicate not only this Court's decisions regarding appearances of impropriety but also those decisions regarding actual pecuniary interests.

process prohibits both actual bias and the appearance of bias on the part of a judge. *See, e.g., Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) ("The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'"); *Archer v. State*, 859 A.2d 210, 227 (Md. 2004) ("Not only does a defendant have the right to a fair and disinterested judge but he is also entitled to a judge who has 'the appearance of being impartial and disinterested.'").[6]

But at least five state supreme courts, agreeing with Justice Benjamin, have held that the Due Process Clause requires only the absence of actual bias and does not require recusal based on an appearance of impropriety. *See State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) ("a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge") (emphasis in original); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006) ("we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has

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[6] *See also Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair.") (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns"); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (due process requires that justice "'satisfy the appearance of justice'").

deprived the proceedings of the appearance of fairness").[7]

Moreover, while stopping short of reading the Due Process Clause to forbid only actual bias, several circuits have held that due process does not invariably require the disqualification of a judge who merely appears to be partial. *See, e.g., Davis v. Jones*, 506 F.3d 1325, 1333 (11th Cir. 2007) (this Court's precedent does not clearly establish "that an appearance problem violates the Due Process Clause"); *Welch v. Sirmons*, 451 F.3d 675, 700 (10th Cir. 2006) (this Court's precedent does not hold "that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause"); *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004) (same); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc) ("The Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance."). These circuits generally acknowledge, however, that even in the absence of actual bias, there may be circumstances that "give rise to a presumption or reasonable probability of bias" sufficient to establish a due process violation. *Welch*, 451 F.3d at 700; *see also Del Vecchio*, 31 F.3d at 1371 ("the due process clause sometimes requires a judge

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[7] *See also State v. Reed*, 144 P.3d 677, 682 (Kan. 2006) ("in order to establish a violation of due process, [one] must demonstrate actual bias or prejudice by the judge"); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D. 2004) (party's "constitutional right to due process is not implicated" where he failed to "assert actual bias or prejudice"); *Kizer v. Dorchester County Vocational Educ. Bd. of Trs.*, 340 S.E.2d 144, 148 (S.C. 1986) ("actual bias rather than a mere potential for bias must be shown").

to recuse himself without a showing of actual bias, where a sufficient motive to be biased exists").

Justice Benjamin's decision not to recuse himself because he saw no objective evidence that he was actually biased in favor of Massey deepens this tripartite disagreement among the lower courts. It also directly conflicts with a decision in which the Supreme Court of Oklahoma—siding with those courts that have deemed an appearance of impropriety sufficient to require recusal—held that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *See Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001); *see also MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) ("There may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice.").

In *Pierce*, the Supreme Court of Oklahoma held that it violated federal due process for a judge to preside over divorce proceedings where an attorney for one of the parties had donated $5,000 to the judge's reelection campaign and solicited other contributions on the judge's behalf while the case was pending. 39 P.3d at 799. The court explained that "the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal." *Id.* at 798 (citing *Murchison*, 349 U.S. at 136) (emphasis in original). Applying the due process principles articulated by this Court in *Murchison*, *Lavoie*, and other cases, the Oklahoma court "conclude[d] that due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicita-

tion of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799 (emphasis in original).

Because "the appearance of justice is often as important as the proper administration of justice," the Oklahoma court further held that "[c]ampaign contributions and solicitation of contributions of funds for judges by lawyers appearing before those judges in such amounts as to give off an appearance of partiality is not the type of error to which [it] will apply a harmless error standard." *Pierce*, 39 P.3d at 800. The court therefore disqualified the trial judge from further proceedings in the case. *Id.*

Justice Benjamin's refusal to recuse himself from consideration of Massey's appeal directly conflicts with the Supreme Court of Oklahoma's conclusion that federal due process requires the recusal of a judge who has benefited from the substantial campaign contributions and fundraising efforts of a party or attorney. Mr. Blankenship, chairman, CEO, and president of Massey, spent $3 million supporting Justice Benjamin's campaign to unseat Justice McGraw after a jury had returned a $50 million verdict against Massey and the case was heading on appeal to the West Virginia Supreme Court of Appeals. In addition to these extraordinary expenditures supporting Justice Benjamin's campaign—which constituted more than sixty percent of the *total* amount spent in support of his candidacy—Mr. Blankenship also solicited funds from potential donors on behalf of the campaign. Justice Benjamin nevertheless refused to recuse himself from consideration of Massey's appeal. If Mr. Blankenship had provided such significant campaign support to a justice on the Supreme Court of Oklahoma, that justice would have been required, under that court's interpretation of

federal due process in *Pierce*, to recuse himself from any case involving Mr. Blankenship.

In light of these divergent understandings of federal due process, this Court should grant review to provide the lower courts with authoritative guidance regarding the recusal standard mandated by the Due Process Clause and the circumstances in which that standard requires the recusal of a judge who has benefited from a litigant's campaign expenditures and fundraising efforts.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO THE PRESERVATION OF PUBLIC CONFIDENCE IN STATE COURT SYSTEMS ACROSS THE NATION.

This case raises a recurring issue of far-reaching national importance. Thirty-nine States elect at least some of their judges, and the amount of money spent on state judicial elections by candidates and third-party interest groups is steadily increasing. Indeed, between 1999 and 2006, candidates seeking seats on state supreme courts raised more than $157 million, which is nearly double the amount raised by candidates in the four previous election cycles. James Sample et al., *The New Politics of Judicial Elections* 15 (2006).

As the amount of contributions and independent expenditures in state judicial races increases, so will the number of cases in which a party or attorney has donated significant sums of money to a judge, and so, too, will requests for recusal of those judges. Although Mr. Blankenship's expenditures on Justice Benjamin's campaign are extraordinary by any measure, they exemplify the growing prevalence of substantial contributions and expenditures in state

judicial elections. *See* Sample, *supra*, at 15 (reporting that the median amount raised in 2006 by candidates for state supreme court seats was $243,910, which is $40,000 more than the median amount in the 2004 election cycle).

In light of the increasingly prominent role of money in judicial elections and the public perception of impropriety that such campaign contributions tend to generate, this Court should clarify the circumstances in which due process requires the recusal of a judge who benefited from the campaign expenditures of a party or an attorney. *Cf.* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1 (discussing study indicating that campaign contributions influenced the voting patterns of elected judges in Ohio). Indeed, this Court has repeatedly emphasized the importance of maintaining the courts' "reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407; *see also White*, 536 U.S. at 802 (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.").

Although "it may seem difficult to reconcile these aspirations with elections" (*Lopez Torres*, 128 S. Ct. at 803 (Kennedy, J., concurring)), elections have long been an accepted means of selecting state court judges. Contributions to judicial candidates from parties and their attorneys are a necessary byproduct of that electoral system, and it is certainly not

the case that every such contribution or expenditure creates an appearance of impropriety that is serious enough to require a judge's recusal. In fact, it will be the exceptional case where due process requires a judge to recuse himself on the basis of campaign expenditures by a party or an attorney.

This is such an exceptional case because of the extraordinary amount of money that Mr. Blankenship spent on Justice Benjamin's campaign, the timing of those expenditures (which were made after the entry of a multimillion-dollar judgment against Massey), and Mr. Blankenship's efforts to solicit campaign contributions from other donors on behalf of the Benjamin campaign. This case therefore represents the ideal opportunity for this Court to provide the lower courts with guidance regarding the factors that courts should weigh when determining whether due process requires recusal.

Ultimately, there is little reason to believe that the role of money in state judicial elections will diminish in the future. Indeed, as partisan interest groups become more actively involved in such elections, it is likely that expenditures on state judicial elections will increase substantially over time. In order to preserve public confidence in state judicial systems inundated with campaign contributions, this Court should grant certiorari and clarify the circumstances in which due process requires the recusal of judges who have benefited from such substantial financial support.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

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APPENDIX

APPENDIX A

Supreme Court of Appeals of West Virginia.

Hugh M. CAPERTON, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., Plaintiffs Below, Appellees,

v.

A.T. MASSEY COAL COMPANY, INC., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., Defendants Below, Appellants.

No. 33350.

Submitted on Rehearing March 12, 2008.

Decided April 3, 2008.

* * *

Appeal from the Circuit Court of Boone County, Honorable Jay M. Hoke, Judge, Civil Action No. 98-C-192.

REVERSED AND REMANDED.

D.C. Offutt, Jr., Stephen Burchett, Perry W. Oxley, David E. Rich, Offutt, Fisher & Nord, Huntington, WV, for Appellants.

Tarek F. Abdalla, Reed Smith LLP, Pittsburgh, PA, for Appellee, Hugh M. Caperton.

Robert V. Berthold, Jr., Christina L. Smith, Berthold, Tiano & O'Dell, Charleston, WV, David B.

Fawcett, Buchanan Ingersoll & Rooney, Pittsburgh, PA, for Appellees, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.

DAVIS, Justice.

The Appellants herein and defendants below, A.T. Massey Coal Company, Inc., and various of its subsidiaries, appeal from a March 15, 2005, order entered in the Circuit Court of Boone County, which denied their post-judgment motions for judgment as a matter of law, a new trial, or remittitur, in response to the entry of a judgment of more than $50 million in favor of the appellees herein, and plaintiffs below, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. In this appeal, A.T. Massey Coal Company and its subsidiaries allege numerous errors that purportedly occurred throughout the proceedings below.

This case is presently before this Court on rehearing.[1] Based upon our thorough consideration of the parties' arguments on rehearing, the relevant case law and the record on appeal, we again conclude that this case may be resolved on two separate and mutually exclusive grounds. First, we find that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries, based upon the existence of a forum-selection clause contained in a contract that directly related to

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[1] The opinion formerly filed in connection with this appeal has been vacated based upon the subsequent voluntary disqualification of two of the justices who participated in the earlier proceedings in this Court.

the conflict giving rise to the instant lawsuit. Assuming, *arguendo*, that the circuit court's denial of the motion to dismiss was not in error, we further conclude that the judgment should be reversed based upon the doctrine of res judicata due to an earlier action that had been litigated in Buchanan County, Virginia. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing, with prejudice, this case against A.T. Massey Coal Company and its subsidiaries.

I.

FACTUAL AND PROCEDURAL HISTORY

Central to the dispute underlying this appeal is the Harman Mine, an underground coal mine located in Buchanan County, Virginia, that produced very high quality metallurgical coal. Prior to 1993, Harman Mine was owned by Inspiration Coal Corporation (hereinafter referred to as "Inspiration") through three subsidiaries: Harman Mining Corporation (hereinafter referred to as "Harman Mining"), Sovereign Coal Sales, Inc. (hereinafter referred to as "Sovereign"), and Southern Kentucky Energy Company (hereinafter referred to as "Southern"). For many years, all of the coal from the Harman Mine had been sold to Wellmore Coal Corporation (hereinafter referred to as "Wellmore"), a subsidiary of United Coal Corporation. In April 1992, Sovereign and Southern entered a coal supply agreement (hereinafter referred to as "the 1992 CSA") with Wellmore. Under the 1992 CSA, Wellmore was to purchase from Sovereign and Southern approximately 750,000 tons of coal per year for a period of ten years.

In 1993, Hugh M. Caperton (hereinafter referred to as "Mr. Caperton"), a plaintiff below and appellee herein, formed Harman Development Corporation[2] (hereinafter referred to as "Harman Development").[3] In that same year, Harman Development purchased the three previously mentioned subsidiaries of Inspiration: Harman Mining,[4] Sovereign[5] and Southern, and thereby became the owner of the Harman Mine.[6]

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[2] Harman Development Corporation is a Virginia corporation that has its principal place of business in Beckley, West Virginia.

[3] Mr. Caperton had worked for Sovereign when it was a subsidiary of Inspiration. As Sovereign's employee, Mr. Caperton sold coal on behalf of Sovereign, including coal from the Harman Mine. Mr. Caperton left Sovereign to form his own coal brokerage company, Dominion Energy. Through Dominion Energy, Mr. Caperton continued to broker coal from the Harman Mine on behalf of Inspiration. In 1993, Dominion Energy became Harman Development Corporation.

[4] Harman Mining is a Virginia corporation that transacts business in West Virginia and is a wholly-owned subsidiary of Harman Development.

[5] Sovereign is a Delaware corporation that has its principal place of business in Beckley, West Virginia. Sovereign is a wholly-owned subsidiary of Harman Development.

[6] The plan Harman Development established for the Harman Mine was to mine the reserves in a way that would allow convenient access to adjoining reserves owned by Pittston Coal Company. The appellees explain that it is commonplace in the mining industry for coal companies to sell or lease their properties to other operators when it makes economic sense to allow someone else to mine their coal. Due to the topography of the area, the Harman Mine provided better access to the Pittston reserves than Pittston itself had. Thus, Mr. Caperton hoped to one day lease the Pittston reserves. However, no lease agree-

Harman Development, Harman Mining and Sovereign are all plaintiffs to this action below, and are appellees herein (hereinafter collectively referred to as "the Harman Companies"). In 1997, in order to fund improvements to the Harman Mine, the Harman Companies sold all the Harman Mine reserves to Penn Virginia Corporation, and then leased back those reserves that could be mined in a cost-effective manner.

From the time the Harman Companies became owners of the Harman Mine until 1997, coal from the Harman Mine was purchased by Wellmore in accordance with the 1992 CSA. Prior to the expiration of the 1992 CSA, in March of 1997, a new CSA with a higher price per ton of coal (hereinafter referred to as "the 1997 CSA") was negotiated between Sovereign, Wellmore and Harman Mining.[7] The 1997 CSA was to be in effect for a period of five years, commencing retroactively on January 1, 1997. However, the 1997 CSA included, among other things, a *force majeure* clause,[8] and a forum-selection clause requiring that

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[Footnote continued from previous page]

ment was ever executed between Pittston and any of the Harman Companies.

[7] The 1997 CSA specified that Wellmore would purchase a minimum tonnage of coal, 573,000 tons per year, and also gave Wellmore the option to purchase all of the Harman Mine's production. Historically, Wellmore had purchased all of the coal that the Harman Mine produced.

[8] The *force majeure* clause was nearly identical to one that had been included in the 1992 CSA, and stated, in relevant part,

> The term "force majeure" as used herein shall mean any and all causes reasonably beyond the control of SELLER or BUYER, as applicable, which cause

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SELLER or BUYER to fail to perform hereunder, such as, but not limited to, acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER. . . . Pertaining to BUYER, the term "force majeure" as used herein shall further include occurrence(s) of a force majeure event at any of BUYER's customer's plants and facilities, except that the effects of any such force majeure event shall not justify BUYER in reducing its purchase of coal hereunder in greater proportion than the coal to be purchased hereunder bears to all BUYER's sources of supply, including BUYER's own mines, for BUYER's metallurgical coal sold to domestic coke producers. SELLER and BUYER shall promptly notify the other following commencement of a force majeure. If because of a force majeure SELLER or BUYER, respectively, is unable to carry out its obligations under this Agreement and if such Party shall promptly give to the other Party written notice of such force majeure, then the obligations of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by such force majeure and during its continuance; provided however, (i) that such obligations shall be suspended only to the extent made necessary by such force majeure and only during its continuance, and (ii) that the Party giving such no-

"[a]ll actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia."[9]

During the course of the 1992 CSA, and at the time the 1997 CSA was executed, one of Wellmore's primary customers was LTV Steel (hereinafter referred to as "LTV"). Wellmore sold and shipped nearly two-thirds of the coal it purchased from the Harman Companies to LTV's coke plant located in Pittsburgh, Pennsylvania.[10] On July 19, 1997, LTV announced that it intended to close its Pittsburgh coke plant due to a change in emissions regulations promulgated by the Environmental Protection Agency.

A.T. Massey Coal Company (hereinafter referred to as "Massey"), a defendant below and appellant herein, had tried unsuccessfully for several years to sell its West Virginia mined coal directly to LTV.[11] Due to its lack of success in selling to LTV on its own, Massey determined to acquire LTV's supplier, Wellmore, and its parent corporation, United Coal

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> tice shall act promptly in [sic] reasonable manner to eliminate such force majeure. . . .

9 This forum-selection clause is identical to one that had been included in the 1992 CSA.

10 LTV purchased from Wellmore a premium blend of coal from the Harman Mine mixed with other, lesser quality coals. The circuit court expressly found that "[c]oal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV."

11 This coal was inferior in quality to the coal obtained from the Harman Mine and sold to LTV through Wellmore.

Corporation (hereinafter referred to as "United").[12] Massey purchased Wellmore and United on July 31, 1997. Since there was no long-term agreement between LTV and Wellmore, Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. An internal Massey memorandum admitted during trial revealed that Massey understood there were risks to its plan, most notably the possibility that the relationship between LTV and Wellmore might not continue under Massey ownership of Wellmore. The circuit court found that, in spite of this risk, and despite the knowledge that LTV was "extremely reluctant to change a long-established, successful coal blend" that included coal from the Harman Mine, Massey nevertheless "provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract."[13] As a consequence of Massey's actions, LTV ceased buying coal from Wellmore. Thereafter, on August 5, 1997, Wellmore, at the direction of Massey, gave notice to the Harman Companies by letter stating that if LTV

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[12] The Harman Companies and Mr. Caperton presented evidence at trial to establish that Massey had for some time desired to sell coal to LTV, and opined that it was this desire that motivated Massey's acquisition of Wellmore, and further motivated Massey to eliminate the Harman Companies as its competitors via the destruction of those companies.

[13] Massey made these demands notwithstanding its knowledge that LTV had historically demonstrated a preference for multiple suppliers and had not entered multi-year coal supply contracts. Additionally, the firm price for its coal that Massey quoted to LTV represented "a handsome improvement" over the prices at which Massey had been selling its coal.

did in fact close its Pittsburgh plant, then Wellmore anticipated a pro rata reduction in tonnage under the *force majeure* clause of the 1997 CSA.

Subsequent to Wellmore's August 5th letter, Massey entered into negotiations with the Harman Companies for the purchase of the Harman Mine. During the course of these negotiations, confidential information regarding the Harman Mine's operations, including its desire to eventually mine adjoining Pittston reserves,[14] as well as confidential information pertaining to the finances of the Harman Companies and of Mr. Caperton, personally, was shared with Massey. The Harman Companies also expressed to Massey their disagreement that the LTV closure of its Pittsburgh coke plant constituted a *force majeure* event.

Thereafter, on December 1, 1997, Wellmore, at Massey's direction, declared *force majeure* based on LTV's closure of its Pittsburgh coke plant, and advised the Harman Companies that it would purchase only 205,707 tons of the 573,000 minimum tons of coal required under the 1997 CSA. According to the express findings of the circuit court on this point,

> [o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "force majeure" based upon a cost benefit

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14 *See supra* note 6.

> analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "force majeure", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

Massey continued in negotiations with the Harman Companies and Mr. Caperton for Massey's purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, "ultimately collapsed the transaction in such a manner so as to increase [the Harman Companies'] financial distress."[15] In addition, Massey utilized the confidential information it had obtained from the Harman Companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to others and thereby de-

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[15] According to testimony presented at trial, during the negotiations of Massey's potential purchase of the Harman Mine, Massey represented that it would assume the Harman coal reserves lease from Penn Virginia "as-is." However, just prior to the scheduled closing of Massey's purchase of the Harman Mine, Massey demanded changes to numerous material terms of the Harman Companies' lease agreement with Penn Virginia. Massey and Penn Virginia could not agree on terms; therefore, Massey's purchase of the Harman Mine was never completed.

crease its value. During the negotiations for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Harman Companies' obligations.[16] Subsequently, the Harman Companies filed for bankruptcy.

Thereafter, in May 1998, Harman Mining and Sovereign sued Wellmore in the Circuit Court of Buchanan County, Virginia, alleging causes of action for breach of contract and for breach of the covenant of good faith and fair dealing arising from Wellmore's declaration of *force majeure*. However, Harman Mining and Sovereign voluntarily withdrew their tort claim prior to trial. Following trial on the contract claim, a jury found in favor of Harman Mining and Sovereign and awarded $6 million in damages.[17]

Shortly after the Virginia action was filed, on October 29, 1998, Harman Development, Harman Mining, Sovereign and Mr. Caperton, individually, filed the instant action in the Circuit Court of Boone

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[16] Mr. Caperton had personal obligations to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial, among others. The circuit court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his detriment on numerous false representations made by Massey. One example of such false representations made by Massey was that it lead Mr. Caperton to believe that it intended to close its purchase of the Harman Mine on January 31, 1998, when, in fact, Massey had already determined not to close the transaction.

[17] Wellmore appealed the verdict to the Supreme Court of Virginia, however the appeal was refused on technical grounds. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002).

County, West Virginia, against A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. (hereinafter collectively referred to as "the Massey Defendants").[18] The first amended complaint in this action was filed on December 10, 1998, and asserted claims of tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentation, civil conspiracy, negligent misrepresentation, and punitive damages. Though numerous pre-trial motions were filed in the underlying action, two in particular are relevant to our resolution of this matter. First, in December 1998, the Massey Defendants filed a motion to dismiss. In their memorandum in support of the motion, the Massey Defendants argued, *inter alia*, that the forum-selection clause of the 1997 CSA required this action to be filed in Buchanan County, Virginia. The circuit court denied the Massey Defendants' motion to dismiss. Thereafter, in April 2002, the Massey Defendants filed a motion for summary judgment, arguing, in relevant part, that the instant action was barred under the legal principal of res judicata. The circuit court denied this motion as well.

Ultimately, only three of the theories of liability asserted in this action were presented to the jury for a verdict:[19] tortious interference, fraudulent misrep-

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[18] Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., are all subsidiaries of A.T. Massey Coal Company, Inc.

[19] The punitive damages claim was presented also.

resentation and fraudulent concealment. On August 1, 2002, the jury found in favor of all plaintiffs on all three grounds and returned a verdict, including punitive damages, of $50,038,406.00. On August 30, 2002, the Massey Defendants filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, remittitur. Following a lengthy delay, by order entered March 17, 2005, the circuit court denied the post-trial motions. This appeal followed.[20]

II.

STANDARD OF REVIEW

Our analysis of this case will consider two issues: first, whether the circuit court erred in denying the Massey Defendants' motion to dismiss on the issue of the forum-selection clause, and, in the alternative, whether the circuit court erred in denying the Massey Defendants' motion for summary judgment on the issue of res judicata.

We first review the correctness of the circuit court's denial of the Massey Defendants' motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA. "This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).[21] However, we now

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[20] There were additional delays in this case involving the trial transcript. The circuit court certified the transcript on August 25, 2006. This appeal was then filed on October 24, 2006.

[21] "Courts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue." Franklin D. Cleckley, Robin J. Davis, & Louis J.

hold that "[o]ur review of the applicability and enforceability of [a] forum[-]selection clause is *de novo*." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993) (citing *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992)). *Cf.* Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

We next consider the circuit court's denial of the Massey Defendants' motion for summary judgment on the issue of res judicata. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). For purposes of our *de novo* review, we further note that

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

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Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5], at 376 (2d ed. 2006).

Syl. pt. 2, *Painter*. Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*. With these considerations in mind, we proceed to address the dispositive issues raised in this appeal.

III.

DISCUSSION

Although numerous issues have been raised on appeal in this case, we find that the instant matter may be resolved on the issue of the forum-selection clause contained in the 1997 CSA between Sovereign Coal Sales, Inc., Wellmore Coal Corporation and Harman Mining Corporation. In the alternative, this case may be resolved based on the doctrine of res judicata. We address each of these issues in turn.

A. Forum-Selection Clause

The 1997 CSA between Sovereign, Wellmore and Harman Mining provided that the "[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia. . . ." In the proceeding below, the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant action should therefore be

dismissed.[22] The circuit court denied the motion to dismiss.

This case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses. By way of definition, it has been recognized that "[a] 'forum selection' provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." 17A Am.Jur.2d *Contracts* § 259, at 255 (2004) (footnote omitted). While forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable:

> The right of an injured party to legal redress is jealously guarded by the courts. Formerly, no agreement confining the right of a party to sue in a particular court or tribunal or in the courts or tribunals of a certain jurisdiction, or to determine the venue of a suit in such a way as to deprive the defendant of his statutory privileges as to place of trial was enforced, unless perhaps where the agreement was made after the cause of action had arisen and was part of a fair compromise. A minority of courts still follow this older rule.
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> During the past two decades, the rules governing the validity of various "forum selection" clauses have been relaxed considerably,

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22 "A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit." *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) (citations omitted).

> the courts following a pattern similar to that which has already been discussed in connection with arbitration clauses. Thus, while it remains true today that a clause or provision *unreasonably or improperly* attempting to deprive a court of its jurisdiction will not be enforced, the modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. This trend is directly traceable to the landmark case of *M/S Bremen v. Zapata Off-Shore Co.*, [407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)], in which the United States Supreme Court upheld the validity of a freely negotiated forum selection clause in a commercial contract between an American firm and a German concern, which specified that any dispute must be determined by the English courts. . . .

7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 15:15, at 290-301 (4th ed. 1997) (footnotes omitted). *See also* 17A Am.Jur.2d *Contracts* § 259, at 255-56 ("While there is contrary authority, generally modern courts will enforce forum-selection clauses entered into by parties to a contract provided that the clauses are not unfair, unreasonable, or unjust under [the] circumstances." (footnotes omitted)).

Although this Court has not had occasion to address substantive issues involving forum-selection clauses, we have previously indicated our general approval of forum-selection clauses by noting that they are not contrary to public policy:

> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W. Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W. Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller, Inc.*, 159 W. Va. 120, 221 S.E.2d 882 (1975). . . .
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> As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. "Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just." *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D. W. Va. 1976). *See also*, *Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D. W. Va.1980).

General Elec. Co. v. Keyser, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(3)[5], at 376-77 (2d ed. 2006) (hereinafter referred to as "*Litigation Handbook*") ("The Supreme Court has indicated in passing that forum selection clauses are not contrary

to public policy." (citing *General Electric Co. v. Keyser*)).

Having found no impediment to the enforcement of forum-selection clauses in general, we now must endeavor to specifically determine whether the forum-selection clause of the 1997 CSA should have been enforced in the instant case.

In *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit articulated a four-part test for determining whether a claim should be dismissed based upon a forum-selection clause. We find this test supported by reason and logic, and by the manner in which such cases have been resolved in other courts; therefore, we now hold that

> [d]etermining whether to dismiss a claim based on a forum[-]selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. . . . The second step requires [classification of] the clause as mandatory or permissive, *i.e.*, . . . whether the parties are required to bring any dispute to the designated forum or [are] simply *permitted* to do so. [The third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . .
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> If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by

> making a sufficiently strong showing that "enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching."

Phillips, 494 F.3d at 383-84 (internal citations omitted) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972)). *See also Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) ("Having found that the forum selection clause in the Consulting Agreement is valid, binding, and enforceable, we must next consider whether it applies to any or all of Dexter's claims against Baan."); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) ("In deciding whether to enforce a mandatory forum-selection clause, courts must determine whether the claims in the case at hand fall within the scope of the forum-selection clause and whether the court should enforce the clause. In addition to resolving issues of scope and enforceability, courts also may have to decide issues as to whether nonsignatories to the contract can enforce the forum-selection clause contained therein."). We now follow this analysis to ascertain whether the instant case should have been dismissed pursuant to the forum selection clause.

1. **Reasonably Communicated**. The first question we must answer is whether the forum-selection clause was reasonably communicated to Mr. Caperton and the Harman Companies. "Although a strong presumption of enforceability attaches to forum selection clauses, *see M/S Bremen*, 407 U.S. at 15, 92 S.Ct. 1907, '[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff. . . .' "*Electroplated Metal Solutions,*

Inc. v. American Servs., Inc., 500 F. Supp.2d 974, 976 (N.D. Ill. 2007) (internal citation omitted) (quoting *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995)). *See also* 17A C.J.S. *Contracts* § 237, at 211 (1999) ("A forum selection clause is unenforceable as to a plaintiff who did not have sufficient notice of the forum selection clause prior to entering the contract.").

This prong of the analysis is easily resolved as Mr. Caperton and the Harman Companies have not argued that the forum-selection clause was not reasonably communicated to them. Furthermore, Sovereign and Harman Mining were parties to the agreement, and Mr. Caperton signed the contract in his capacity as president of Sovereign. Therefore, these parties cannot claim ignorance of the plainly worded forum-selection clause, which "clearly convey[ed] to any reader that any action regarding the [CSA] must be brought in a specific court, and the location of that court [was] readily ascertainable. . . ." *Klotz v. Xerox Corp.*, No. 07 CIV 1734 (GEL), 519 F. Supp.2d 430, ----, 2007 WL 3100220, at *2 (S.D.N.Y. Oct. 22, 2007). Moreover, though Harman Development, the parent company of Sovereign and Harman Mining, was not a party to the 1997 CSA, Mr. Caperton is the sole owner of Harman Development. Since Mr. Caperton had knowledge of the clause, Harman Development is deemed to have knowledge of the clause. *See Clark v. Milam*, 192 W. Va. 398, 402, 452 S.E.2d 714, 718 (1994) ("Generally, a corporation 'knows,' or 'discovers,' what its officers and directors know."). Thus, we find sufficient evidence in the record of this case to establish that the forum-selection clause was reasonably communicated to those who now resist its application.

2. Mandatory or Permissive. The second step in our analysis is to determine whether the forum-selection clause is mandatory or permissive. It has been widely recognized, and we now expressly hold that "[t]here are two types of forum[-]selection clauses: mandatory and permissive. A mandatory forum[-]selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum[-]selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere." *Litigation Handbook* § 12(b)(3)[5], at 376 (footnote omitted) (citing *K. & V. Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494 (10th Cir. 2002)). *See also Weisser v. PNC Bank, N.A.*, No. 3D07-487, ---- So.2d ----, 2007 WL 2848118, at *2 (Fla. Dist. Ct. App. 2007) (" 'Permissive [forum selection] clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.' . . . In contrast, mandatory forum selection clauses provide 'for a mandatory and exclusive place for future litigation.' " (citations omitted)); *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 (NAM) (GJD), ---- F. Supp.2d ----, 2007 WL 2891981, at *8 (N.D.N.Y. 2007) ("A mandatory forum selection clause grants exclusive jurisdiction to a selected forum and should control absent a strong showing that it should be set aside. . . . In contrast, 'a permissive forum selection clause indicates the contracting parties' consent to resolve their dispute in a given forum, but does not require the dispute to be resolved in that forum . . . .' " (internal citations omitted)).

Resolution of the question of whether a forum-selection clause is mandatory or permissive requires scrutiny of the particular language used.

> In determining whether a forum selection clause is mandatory or permissive, the language of the clause must be examined. For example, in *Quinones*, the Florida Supreme Court found that the forum selection clause was permissive, not mandatory, because it provided that the creditor **"may"** institute legal proceedings in specified courts, not that it **"shall"** do so. [*Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So.2d 273, 275 (Fla. 1987)] (emphasis added). . . ." Conversely forum selection clauses which state or clearly indicate that any litigation **must** or **shall** be initiated in a specified forum are mandatory." *Shoppes Ltd. [P'ship v. Conn*, 829 So.2d 356, 358 (Fla. Dist. Ct. App. 2002)] (emphasis added) (citing *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So.2d 627 (Fla. 1st DCA 1999)).

Weisser, 2007 WL 2848118, at *2-3. The *Weisser* Court also cited *Regal Kitchens, Inc. v. O'Connor & Taylor Condominium Construction, Inc.*, 894 So.2d 288, 290 (Fla. Dist. Ct. App. 2005), wherein the court examined a forum-selection clause which stated that "[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, *with proper venue in Palm Beach County*." (Emphasis added). The *Regal Kitchens* Court observed that the clause was mandatory as to the law to be applied, but permissive as to the forum, commenting that,

> [i]n the instant case, although the venue clause unequivocally states that Florida law

> shall apply to any litigation of the subcontract, it lacks mandatory language or words of exclusivity to show that venue is proper only in Palm Beach County. *See Shoppes Ltd. P'ship v. Conn.*, 829 So.2d at 357-58. That is to say, this clause does not unequivocally mandate that a controversy or dispute be litigated in Palm Beach County, nor does it waive any other territorial jurisdiction. The language merely allows a party to file suit in Palm Beach County.

894 So.2d at 291-92.

Thus, to be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.

> A forum selection clause is mandatory if jurisdiction and venue are specified with mandatory or exclusive language. *John Boutari & Sons, Wine & Spirits, S.A. v. Attiki Imp. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994). In *Boutari*, the Second Circuit held that "[t]he general rule in cases containing forum selection clauses is that [w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." *Boutari*, 22 F.3d at 52. . . .

Great N. Ins. Co., 2007 WL 2891981, at *8 (additional citations omitted). *See also K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494, 499 (10th Cir. 2002) ("'[W]here venue is specified [in a forum-selection

clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum-selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.'" (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992)). *See also Printing Servs. of Greensboro, Inc. v. American Capital Group, Inc.*, 637 S.E.2d 230, 232 (N.C. Ct. App. 2006) ("'[T]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.'" (quoting *Mark Group Int'l, Inc. v. Still*, 566 S.E.2d 160, 161 (N.C. Ct. App. 2002))).

An example of a case illustrating a forum-selection clause that used mandatory language is *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). In that case, the plaintiff entered into a contract with the defendant to distribute equipment manufactured by the defendant. The contract contained a forum-selection clause that contained the following pertinent language: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." *Docksider*, 875 F.2d at 763. A dispute arose over the contract that resulted in the plaintiff filing an action against the defendant in a federal district court in California. The district court

dismissed the action on the grounds that the forum-selection clause required the case be filed in a Virginia court. The plaintiff appealed on the grounds that the forum-selection clause was permissive, not mandatory. The Court of Appeals for the Ninth Circuit disagreed with the plaintiff, ruling as follows:

> The critical language in [the clause] is the final sentence: "Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." The district judge concluded that this language represented the parties' intent to pursue any litigation that arose only in Virginia. [Plaintiff] contends that this interpretation is erroneous because the contractual language does not contain any express mandatory term such as "exclusively" that would indicate the parties' intent to vest Virginia with exclusive jurisdiction. [Plaintiff] has cited numerous cases as support for this position, relying principally on *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987).
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> . . . .
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> *Hunt Wesson* is distinguishable because the forum selection clause underlying this action contains the additional sentence stating that "[v]enue of any action brought hereunder shall be deemed to be in . . . Virginia." This language requires enforcement of the clause because [plaintiff] not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language

> makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in Virginia.

Docksider, 875 F.2d at 763-64.

In accordance with the foregoing authorities, we now hold that the determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall,"[23] or exclusive terms such as "sole," "only," or "exclusive," the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

Turning to the instant case, the forum-selection clause utilized mandatory language that identified the jurisdiction wherein disputes would be tried: "[a]ll actions brought in connection with this Agreement *shall* be filed in and decided by the Circuit Court of Buchanan County, Virginia." (Emphasis added). Accordingly, we are presented with a man-

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[23] This Court has often recognized that " '[i]t is well established that the word "shall," in the absence of language . . . showing a contrary intent . . . , should be afforded a mandatory connotation.' " Syl. pt. 1, in part, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). *See also State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)).

datory forum-selection clause. *See Ex parte Bad Toys Holdings, Inc.*, 958 So.2d 852, 856 (Ala. 2006) ("The forum-selection clause in the purchase agreement provides that '[v]enue for any legal action which may be brought hereunder *shall* be deemed to lie in Sullivan County, Tennessee' (emphasis added). The . . . use of the word 'shall' in the forum-selection clause makes the clause mandatory, not permissive."); *Town of Homer v. United Healthcare of Louisiana, Inc.*, 948 So.2d 1163, 1167 (La. Ct. App. 2007) ("We find the forum selection clause at issue to be clear and explicit. The clause expressly states that the proper venue for ***any legal action shall*** be East Baton Rouge Parish. There is no ambiguity in this mandatory provision."); *Polk County Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co., Inc.*, 734 N.W.2d 750, 758 (Neb. 2007) ("The forum selection clause in the Thornridge lease provides that any action concerning the lease 'shall be' brought in Pennsylvania. We read this forum selection clause to be a mandatory clause. . . ."); *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) ("Because the clause states that 'all' disputes 'shall' be at Siempelkamp's principal place of business, it selects German court jurisdiction exclusively and is mandatory."). Having determined that the forum-selection clause at issue in this case is a mandatory clause, we must now determine whether the claims and parties involved in the suit are governed by said clause.

3. Claims and Parties. The third part of our analysis is to determine whether the claims and parties involved in the suit are governed by the forum-selection clause. We address these questions separately.

a. Are the claims asserted in the instant suit subject to the forum-selection clause? Mr. Caperton and the Harman Companies have argued that the claims asserted in this action are not governed by the forum-selection clause because they are tort, as opposed to contract, claims. We disagree.

It has been recognized that,

> [w]hen a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause. . . . The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 687-88 (Tex. App. 2007) (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221-22 (5th Cir. 1998)). *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 388 (2d Cir. 2007) ("[W]hen ascertaining the applicability of a contractual provision to particular claims, we examine the substance of those claims, shorn of their labels."). Accordingly, we expressly hold that, to determine whether certain claims fall within the scope of a mandatory forum-selection clause, the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Turning to the case at hand, we must first examine the language of the mandatory forum-selection clause at issue. Because the 1997 CSA expressly states that it "shall be . . . construed . . . in accordance with the substantive laws of the Commonwealth of Virginia," we will scrutinize the language of the clause pursuant to Virginia law. Notably, un-

der Virginia law, "[w]ritten contracts are construed as written, without adding terms that were not included by the parties. When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words that the parties used are normally given their usual, ordinary and popular meaning." *Heron v. Transportation Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007).

The forum-selection clause of the 1997 CSA states in plain language that it applies to "[a]ll actions brought in connection with this Agreement." Due to the inclusion of the phrase "all actions," we perceive no intent by the parties to this agreement to limit in any way the type of actions to which it applies. Thus, for example, it would apply equally to contract claims, tort claims and statutory claims, so long as such claims are "brought in connection with" the 1997 CSA.

Considering next the "usual, ordinary and popular meaning" of the phrase "in connection with," we find the intended scope of the forum-selection clause to be quite broad. *Heron*, 650 S.E.2d at 702. The word "connection" in the context herein used, is generally understood to mean "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in another." II The Oxford English Dictionary 838-39 (1970 re-issue). *See also* Random House Webster's Unabridged Dictionary 431-32 (2d ed. 1998) (defining "connection" in part as "association; relationship . . ."); Webster's Third New International Dictionary 481 (1993) (defining "connection" in relevant part as "the state of being connected or linked . . . relationship or association in thought (as of cause and effect, logical sequence, mutual de-

pendence or involvement)"). Thus, so long as the claims asserted in this action bear a logical relationship to the 1997 CSA, they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law.

Other courts considering forum-selection clauses that contained broad language such as that used in the instant clause have similarly determined that the clauses were not intended to apply merely to breach of contract claims, but rather were intended to apply to other claims as well. For example, the United States Court of Appeals for the Second Circuit was asked to determine the scope of a forum-selection clause that stated: "'any legal proceedings that may arise out of [the agreement] are to be brought in England.'" *Phillips*, 494 F.3d at 382. In determining the meaning of "arise out of," the court contrasted language such as "in connection with" as being more expansive: "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or '*arise in connection with*' the contract." *Id.*, 494 F.3d at 389 (emphasis added) (citations omitted). In a different case, the Second Circuit also rejected an interpretation of a forum-selection clause that utilized the phrase "in connection with" as applying only to breach of contract claims:

> There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, . . . with respect to the forum selection clauses, in terms of submission for "all purposes of and *in connection with*" the agreements (empha-

> sis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir. 1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974), held that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale. *Id.*, 417 U.S. at 519-20, 94 S.Ct. at 2457. We find no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the [Appellants'] contention that only allegations of contractual violations fall within the scope of the clauses.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993).

Given the similarities between the phrases "in connection with" and "in relation to," we also note that the Third Circuit has reasoned,

> In this case, we must interpret the provision in the forum selection clause that gives the English courts exclusive jurisdiction over "any dispute arising . . . in relation to" the 1990 Agreement. The ordinary meaning of the phrase "arising in relation to" is simple. To say that a dispute "arise[s] . . . in relation to" the 1990 Agreement is to say that the origin of the dispute is related to that agreement, *i.e.*, that the origin of the dispute has

> some "logical or causal connection" to the 1990 Agreement. *Webster's Third New International Dictionary*, 1916 (1971).

John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997). *See also Klotz v. Xerox Corp.*, No. 07 CIV 1734(GEL), 519 F. Supp. 2d 430, ---- & n.4, 2007 WL 3100220, at *2 & n.4 (S.D.N.Y Oct. 22, 2007) (concluding that "[p]laintiff raises no challenge to the scope of the forum selection clause, nor could she, since the expansive language of the provision-covering '[a]ny action in connection with the Plan by an Employee'-plainly encompasses her claims"; and further commenting that "[p]laintiff's state law tort and contract claims are also part of an 'action in connection with the Plan' and are covered by the clause" (footnote omitted)); *Doe v. Seacamp Assoc., Inc.*, 276 F. Supp.2d 222, 227 (D. Mass. 2003) ("A review of the case law leads me to conclude that the tort claims, too, are covered by the forum selection clause. The forum selection clause was worded to indicate that it governed any claim related to or arising from a contract, the subject of which were the terms and conditions of John Doe's enrollment at Seacamp."); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (finding tort and statutory claims were subject to forum-selection clause).

Turning to the instant case, we note that the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding

whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were: (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment. Based upon our review of these tort claims, we conclude that they were indeed "brought in connection with" the 1997 CSA.

All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore's declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA. While the amended complaint methodically sets out numerous details of purported pre-*force majeure* wrongful conduct, no injury resulted from any of that alleged conduct without the declaration of *force majeure* under the 1997 CSA.

For example, "Count I" of the amended complaint alleges tortious interference with existing contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants. Thus, this claim is "brought in connection with" the 1997 CSA.

"Count II" of the amended complaint alleged tortious interference with prospective contractual relations, again involving Wellmore, Penn Virginia and the UMWA. As with Count I, the key to these claims remains Wellmore's wrongful declaration of *force majeure*. In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey. Therefore this claim is "brought in connection with" the 1997 CSA.

Finally, "Count III" alleges fraudulent misrepresentation, deceit and concealment either related to the declaration of *force majeure* itself or related to subsequent negotiations between the Harman Companies and the Massey Defendants "regarding their intentions to enter into a settlement agreement with Harman in connection with the 1997 CSA." Insofar as this claim either relates directly to the declaration of *force majeure* under the 1997 CSA, or to the parties' efforts to reach a settlement with respect to the 1997 CSA, it is "brought in connection with" the 1997 CSA.

Accordingly, because none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore's declaration of *force majeure* under the 1997 CSA, these claims are all "brought in connection with" the 1997 CSA and, as a consequence, are within the scope of the forum-selection clause contained therein.[24]

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[24] Some courts have concluded that a forum-selection clause is applicable to tort claims only where the resolution of the claim requires interpretation of the contract. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988)

b. Are the parties involved in the suit subject to the forum-selection clause? The Harman Companies and Mr. Caperton have argued that, as strangers to the 1997 CSA, the Massey Defendants are precluded from enforcing its terms as they are not third-party beneficiaries of the contract. The Harman Companies and Mr. Caperton further argued that two of the plaintiffs to this action, Harman Development and Mr. Caperton (in his individual capacity), are not signatories to the 1997 CSA and, therefore, may not be bound by its terms. We disagree.

Other courts addressing the issue of whether non-signatories to a contract may enforce, or be subject to, a forum-selection clause have found the clauses to be enforceable under certain circumstances. One such case is *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). The *Manetti-Farrow* case involved a contract between a California corporation, Manetti-Farrow, and

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[Footnote continued from previous page]

("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." (citing *Weidner Communications, Inc. v. Faisal*, 671 F. Supp. 531, 537 (N.D. Ill. 1987); *Berrett v. Life Ins. Co.*, 623 F. Supp. 946, 948-49 (D. Utah 1985); *Clinton v. Janger*, 583 F. Supp. 284, 288 (N.D. Ill. 1984))). While we might agree with this proposition were we presented with a more narrowly tailored forum-selection clause applying to claims "arising under" or "arising out of" the contract, we see no need for such a narrow rule in the context of a broadly worded forum-selection clause such as the one presently before us. Nevertheless, we do note that, insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful.

Gucci Parfums, an Italian corporation that was a subsidiary of another Italian corporation, Guccio Gucci, S.p.A. (hereinafter referred to as "Guccio Gucci"). The contract included a forum-selection clause that stated: "[f]or any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction." *Manetti-Farrow*, 858 F.2d at 511. Another company, Gucci America, signed a consent and ratification agreement, in which it consented to the contract between Manetti-Farrow and Gucci Parfums. Ultimately a dispute arose, and Manetti-Farrow filed suit in California alleging numerous causes of action, not only against Gucci Parfums and Gucci America, but also against the parent company, Guccio Gucci, as well as numerous officers of these companies. *Manetti-Farrow*, 858 F.2d at 511-12. Upholding the district court's dismissal based upon the forum-selection clause, the Ninth Circuit found that a forum-selection clause was applicable to "a range of transaction participants" who were "closely related to the contractual relationship":

> Manetti-Farrow argues the forum selection clause can only apply to Gucci Parfums, which was the only defendant to sign the contract. However, "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-03 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 315 (1983)). We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship

that the forum selection clause applies to all defendants.

858 F.2d at 514 n.5.

Similarly, in *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), it was argued that two corporate plaintiffs to a lawsuit, GCM and OMI, were not parties to the contract containing the forum-selection clause (which plaintiff Hugel had signed), and therefore, were not bound by the clause. In rejecting the argument, the court relied on the companies' close relationship to the agreement and the foreseeability that they would be bound by the forum-selection clause:[25]

> In order to bind a non-party to a forum selection clause, the party must be "closely related" to the dispute such that it becomes "foreseeable" that it will be bound. . . . Hugel is President and Chairman of the Board of both GCM and OMI. In addition, Hugel owns 99% of the stock of GCM which, in turn, owns 100% of the stock of OMI. The alleged assurances of confidentiality were made to Hugel alone and Hugel alone decided that his corpo-

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[25] The contract dispute in the *Hugel* case arose after plaintiff Dieter Hugel became a member of the Corporation of Lloyd's. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993). Hugel signed a membership contract that included the forum-selection clause. *Id.* Thereafter, Lloyd's became suspicious that Hugel and GCM were involved in criminal misconduct and initiated an investigation. *Id.* Hugel cooperated with the investigation and provided confidential information pertaining to GCM and OMI. In the subsequent lawsuit, plaintiffs Hugel, GCM and OMI claimed that "they lost business as the result of Lloyd's breach of confidentiality relating to the investigation." *Id.*

> rations would participate in Lloyd's investigation.
>
> Hugel and Lloyd's contracted to settle all of their disputes in England. Although GCM and OMI were not members of Lloyd's, in the course of a dispute between Hugel and Lloyd's, Hugel alone involved his two controlled corporations and supplied information allegedly belonging to those corporations. The district court found that the corporations owned and controlled by Hugel are so closely related to the dispute that they are equally bound by the forum selection clause and must sue in the same court in which Hugel agreed to sue. We hold these findings are not clearly erroneous.

999 F.2d at 209-10. Furthermore, the *Hugel* court made clear that a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party:

> Plaintiffs argue that the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by definition, satisfy the "closely related" and "foreseeability" requirements, *see e.g.*, *Coastal Steel*, 709 F.2d at 203 (refusing to absolve a third-party beneficiary from the strictures of a forum selection clause which was foreseeable); *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill.

> 1984), *a third-party beneficiary status is not required.*

Hugel, 999 F.2d at 209-10 n.7 (emphasis added).[26]

In another case, *Great Northern Insurance Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 NAM GJD, --- F. Supp.2d ----, 2007 WL 2891981 (N.D.N.Y. Sept. 28, 2007), two German companies entered into a supply agreement whereby Constab Polymer-Chemie (hereinafter referred to as "Constab") would supply products used to produce photo paper to Feliz Schoeller GmbH & Co. and its subsidiaries, one of which was Schoeller-USA. --- F. Supp.2d at ----, 2007 WL 2891981, at *1. The contract included a forum-selection clause specifying that jurisdiction of certain disputes would be in Warstein, Germany. *Id.*, --- F. Supp.2d at ----, 2007 WL 2891981, at *7. Constab provided defective products to Schoeller USA, and Schoeller USA, through its insurer, filed suit in California.[27] In rejecting the argument that, as non-parties to the contract Great Northern and Schoeller-USA could not enforce the forum-selection clause, the court reasoned,

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[26] *But see Pixel Enhancement Labs., Inc. v. McGee*, 1998 WL 518187, at *2 (D. Mass. 1998) ("As McGee is not a third party beneficiary of the License Agreement, he has no standing to assert its forum selection clause. *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) ("[T]hird party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to non-signatories).").

[27] Great Northern provided indemnity insurance to Schoeller-USA and, in accordance with the insurance policy, compensated Schoeller-USA for its losses resulting from the defective product and became subrogated to Schoeller-USA's rights.

> [n]either Great Northern nor [its insured] Schoeller-USA are signatories to the Agreement. However, the enforcement of the forum selection clause is clearly "foreseeable" given the relationships between the parties and the basis upon which plaintiff has commenced this suit. Therefore, the Court finds that the forum selection clause may be invoked against plaintiff. . . .

---- F. Supp.2d at ----, 2007 WL 2891981, at *8. *See also Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006) (enforcing forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted from the performance of the contract); *Marano Enters. of Kansas v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (concluding non-signatory to contract was "closely related to the disputes arising out of the agreements and properly bound by the forum-selection provisions" due to his status of "shareholder, officer and director" of corporate signatory (internal quotations and citation omitted)); *Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp.2d 1054, 1056-57 (D. Minn. 2008) ("[A] third party may be bound by a forum-selection clause where it is closely related to the dispute such that it becomes foreseeable that it will be bound. . . . It is true that the majority of cases binding a third party to a forum-selection clause under the closely-related-party doctrine involved third parties *suing* as plaintiffs, rather than those *being sued* as defendants. . . . But the Court does not believe that the closely-related-party doctrine is limited to third-party plaintiffs. Indeed, when deciding whether the doctrine applies, a court must answer only the following question: should the third party reasonably foresee being

bound by the forum-selection clause because of its relationships to the cause of action and the signatory to the forum-selection clause?" (internal quotations and citations omitted)); *Compana LLC v. Mondial Assistance SAS*, No. 3:07-CV-1293-D, 2008 WL 190522, at *4 (N.D. Tex. Jan. 23, 2008) ("The Fifth Circuit recognizes two theories of estoppel that can bind a nonparty of a contract to the contract's arbitration or forum selection clause. The first is called an 'intertwined claims theory' of equitable estoppel, which grants a non-signatory to a contract the right to enforce a provision of the contract against a signatory. . . . The Fifth Circuit recognizes another form of estoppel-'direct benefits estoppel'-which grants a signatory to a contract the right to enforce a contract provision against a non-signatory." (internal citations omitted)); *Aspitz v. Witness Sys., Inc.*, No. C 07-02068 RS, 2007 WL 2318004, at *3 (N.D. Cal. Aug. 10, 2007) (observing fact that party did not sign agreement is not controlling as to whether forum-selection clause would be enforced); *Affiliated Mortg. Prot., LLC v. Tareen*, Civ. A. No. 06 4908 (DRD), 2007 WL 203947, at *4 (D.N.J. Jan. 24, 2007) ("[W]here a third party's conduct is closely related to the contractual relationship, the forum selection clause applies to the third party." (internal quotations and citation omitted)); *Novak v. Tucows, Inc.*, No. 06CV1909 (JFB)(ARL), 2007 WL 922306, at *13 (E.D.N.Y. March 26, 2007) ("[A]t least two courts within this Circuit have held that [i]t is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . A non-party to an agreement may be bound by a forum selection clause where the party is closely related to the dispute such that it becomes foreseeable that it will be bound."

(internal quotations and citations omitted)); *First Specialty Ins. Corp. v. Admiral Ins. Co.*, No. CV 07 408 MO, 2007 WL 1876516, at *3 (D. Or. June 22, 2007) ("[A] range of transaction participants, including non-parties, should be bound by forum selection clauses of an underlying agreement if their conduct is 'closely related to the contractual relationship.'. . . The fact that either one or both parties was not a signatory to the underlying contract is not dispositive." (internal citations omitted)); *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2463283, at *6 (E.D. Tenn. Aug. 27, 2007) ("Other courts have enforced a contractual forum selection clause against non-signatories to the contract, so long as those parties were closely related to the dispute and it was foreseeable they might be bound." (internal quotations and citations omitted)); *Weingard v. Telepathy, Inc.*, No. 05 Civ. 2024 (MBM), 2005 WL 2990645, at *5 (S.D.N.Y. Nov. 7, 2005) ("Other Circuits have held that a contractually-based forum selection clause also covers tort claims against non-signatories if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties, . . . or if resolution of the claims relates to interpretation of the contract, or if the tort claims involve the same operative facts as a parallel claim for a breach of contract.". . . (internal quotations and citations omitted)); *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1434 (N.D. Cal. 1997) ("It is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . [T]he conduct of GTSI and Mr. Fuller are closely related [to] the contractual relationship between Mr. Graham and TPI, and the forum selection clause applies to both

GTSI and Mr. Fuller in spite of the fact that they are not signatories to the PSA." (internal quotations and citations omitted)); *Beck v. CIT Group/Credit Fin., Inc.*, Civ. A. No. 94-5513, 1995 WL 394067, at *6 (E.D. Pa. June 29, 1995) ("That Mr. Beck signed the Security Agreement as president of Beck Co. is of little consequence given his intimate relationship to Beck Co., the benefit to him from the funding provided, the circumstances giving rise to his claims that he was personally injured by the manner in which defendant performed under the agreement and his request to be credited personally for amounts allegedly overcharged to Beck Co. . . . Assuming that Mrs. Beck has standing on the claims asserted, she is similarly subject to the forum selection provisions. Moreover, given the relationship of the Becks and the circumstances presented, it would be wholly inappropriate to permit Mr. Beck to evade the forum provision in his guaranty and elsewhere by initiating suit jointly with Mrs. Beck." (internal citations and footnote omitted)); *Sparks Tune-Up Ctrs., Inc. v. Strong*, No. 92 C 5902, 1994 WL 188211, at *5 (N.D. Ill. May 12, 1994) ("The binding thread in cases which hold that a non-signatory party should 'benefit from and be subject to' a forum selection clause is an overriding concern to prevent a contracting party from escaping contractual obligations which he bargained for and/or agreed upon."); *Lu v. Dryclean-U.S.A. of California, Inc.*, 11 Cal. App. 4th 1490, 1493-94, 14 Cal.Rptr.2d 906, 908 (1992) ("[P]laintiffs argue enforcement of the forum selection clause would be unreasonable because two of the defendants, Dryclean Franchise and Dryclean U.S.A., did not sign the Agreement containing the clause. Again, we are compelled to disagree. A range of transaction participants, parties and non-

parties, should benefit from and be subject to forum selection clauses." (internal quotations and citation omitted)); *Citigroup Inc. v. Caputo*, 957 So.2d 98, 102 (Fla. Ct. App. 2007) ("Even assuming Citigroup were not covered by the Citibank Agreement, a non-signatory may invoke a signatory's forum selection clause where the non-signatory and signatory are related."); *Deloitte & Touche v. Gencor Indus., Inc.*, 929 So.2d 678, 684 (Fla. Dist. Ct. App. 2006) (observing that "where the interests of a non-party are directly related to or completely derivative of those of the contracting party, the non-signatory is bound by the contract's forum selection clause."); *Tuttle's Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So.2d 873, 873-74 (Fla. Dist. Ct. App. 1992) (recognizing that reasonable forum-selection clause would be enforced against non-signatory); *Brinson v. Martin*, 220 Ga.App. 638, 640, 469 S.E.2d 537, 539-40 (Ga. Ct. App. 1996) ("[Plaintiff] Brinson also contends the court erred in dismissing his claims against Martin. He argues that regardless of whether the venue clause is applicable to Woodmen, the clause would not apply to his claims against Martin for tortious interference with economic relations and unjust enrichment because those claims do not arise out of the contract and involve parties who were not signatories to the contract. . . . [D]espite Brinson's attempt to characterize his claims against Martin as falling outside the business relationship he had with Woodmen, it is clear from his complaint that the claims arose either directly or indirectly from his contract with Woodmen. Under these circumstances, we are persuaded that if Martin were not entitled to rely on the clause, separate actions would likely be brought, possibly resulting in varying decisions, inconsistent with the administration of justice. For these rea-

sons, we conclude that the trial court did not err in ruling that Martin may rely on the forum selection clause in this case."); *Grott v. Jim Barna Log Sys.-Midwest, Inc.*, 794 N.E.2d 1098, 1104-05 (Ind. Ct. App. 2003) ("The Texas Court of Appeals has applied forum-selection clauses to nonsignatories to a contract who are transaction participants[,] . . . mean[ing] an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum-selection clause." (internal quotations, citations, and footnotes omitted)); *Titan Indem. Co. v. Hood*, 895 So.2d 138, 148 (Miss. 2004) (quoting approvingly comment from *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996), stating "[w]e agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract . . ."); *Dogmoch Int'l Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397, (N.Y. App. Div. 2003) ("Although defendant was a nonsignatory to the account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause given the close relationship between itself and its subsidiary. . . ."); *Kelly v. Bear, Stearns & Co. Inc.*, No. CONTROL 080832, 2001 WL 1807360, at *2 (Pa. Commw. Ct. Dec. 18, 2001) ("[P]laintiffs argue that as non-signatories to the Engagement Letters, the forum selection clause does not apply to them. This court disagrees. This dispute is governed by the forum selection clause because the claims asserted clearly arise out of the only possible relationship plaintiffs had with Bear Stearns-the Engagement Letters."); *Sevier County Bank v. Paymentech Merch. Servs.*, Inc., No. E2005-02420-COA-

R3-CV, 2006 WL 2423547, at *9 (Tenn. Ct. App. Aug. 23, 2006) ("We agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract. By transaction participant, we mean an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause. To hold otherwise would allow a nonsignatory employee, who was a transaction participant, to defeat his company's agreed-to forum by refusing to be bound by the employer's contract. This cannot be. We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract."); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996) ("We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract." (footnote omitted)).

Based upon the foregoing, we now hold that a plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract. We further hold that a defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract.

Applying the foregoing holdings to the facts of the instant case, we first note that, as to the plaintiffs, Sovereign; Mr. Caperton, as president of Sovereign; and Harman Mining were signatories to the 1997 CSA; Harman Development and Mr. Caperton, in his individual capacity, were not. However, Sovereign and Harman are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Under these facts, any claim brought by Mr. Caperton and Harman Development in connection with the 1997 CSA are closely related to the contract and are, therefore, subject to the forum-selection clause contained therein. As we determined in the preceding section of this opinion, the three factually-supported claims asserted in the first amended complaint[28] all flowed from the wrongful declaration of *force majeure* under the 1997 CSA, and were brought in connection with that contract. Accordingly, we find that Mr. Caperton and Harman Development are bound by the forum-selection clause of the 1997 CSA.

Turning to the Massey Defendants, we note that none of them were signatories to the 1997 CSA. However, Defendant Massey subsequently became the parent company to Wellmore, who is a signatory of the 1997 CSA, and Wellmore was Massey's sub-

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28 As we noted in the preceding section of this opinion, the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the first amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Therefore, we limit our consideration to only those three claims that ultimately went to the jury.

sidiary at the time it declared *force majeure*.[29] All the other Massey Defendants are also subsidiaries of Massey. The complaint plainly alleges that Massey, along with all its subsidiaries who are defendants in this action, exercised "domination and control" over Wellmore and directed Wellmore to wrongfully declare *force majeure*. Because, as we previously determined, all of the claims in this action flow directly from the declaration of *force majeure*, and the complaint alleges that the Massey Defendants controlled Wellmore's declaration of *force majeure*, the complaint plainly demonstrates that the claims against the Massey Defendants are closely related to the contract. Therefore, we find that the Massey Defendants are entitled to enforce the forum-selection clause of the 1997 CSA.

4. Rebuttal. Because the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in this dispute, it is presumptively enforceable. Thus, the final step to our analysis is to ascertain whether the Harman Companies and Mr. Caperton have rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

In this regard, it has been recognized that

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[29] The 1997 CSA was executed in March 1997, and was made retroactively effective to January 1, 1997. Massey acquired Wellmore on July 31, 1997, when it purchased United Coal Corporation and United's subsidiary Wellmore. Wellmore declared *force majeure* on December 1, 1997.

> [m]andatory choice of forum clauses will be enforced unless they are "unreasonable." *Davis Media Group*, 302 F. Supp. 2d at 466 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10, 92 S.Ct.1907)." Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996).

Belfiore v. Summit Fed. Credit Union, 452 F. Supp.2d 629, 631-32 (D. Md. 2006) (footnotes omitted). Moreover,

> [a] party trying to defeat a mandatory choice of forum clause bears a "heavy burden." *See Davis Media Group v. Best Western Int'l, Inc.*, 302 F. Supp.2d, 464, 469-70 (D. Md. 2004); *see also, e.g., Sarmiento v. BMG Entm't*, 326 F. Supp. 2d 1108, 1111 (C.D. Cal. 2003) ("[I]f the resisting party fails to come forward with anything beyond general and conclusory allegations of fraud and inconvenience, the court must uphold the agreement").

Id. at 631 n. 1. In this case, the Harman Companies and Mr. Caperton have not argued, either below or before this Court, that enforcement of the forum-selection clause of the 1997 CSA, i.e. requiring that this case be litigated in Virginia, was unreasonable

or unjust at the time of the Massey Defendants' motion to dismiss,[30] or that the clause was invalid for

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[30] On rehearing, the Harman Companies and Mr. Caperton argue, in part, that it is unjust to apply the forum-selection clause to deprive them of the large jury verdict awarded below. The proper question, however, is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*. The Harman Companies and Mr. Caperton have not come forth with any facts or argument that enforcement of the forum-selection clause was unreasonable or unjust at that time. In addition, Mr. Caperton asserts that because this action has been fully litigated in West Virginia, and because a remedy may no longer be available in Virginia due to the running of the limitations period, it is unjust to enforce the forum selection clause. We reject this reasoning as it would effectively divest appellate courts of their appellate jurisdiction over a lower court's denial of a motion to dismiss based upon a forum selection clause as it relates to tort claims. First, because of the lengthy time involved in prosecuting a case to a final judgment and in pursuing the appellate process, the limitations period for filing a tort action in the proper forum is likely to have always run by the time of this Court's review, thus, there may never be a tort remedy available in the proper forum. Next, the defendants in this action are entitled to seek review of the lower court's decision on appeal. *See* Syllabus point 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W. Va. 46, 106 S.E.2d 97 (1958) (" 'Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken.' Point 2, syllabus, *Lloyd v.. Kyle*, 26 W. Va. 534 [1885]."). Finally, the cases cited by Mr. Caperton in support of his argument that it would be unjust to apply the forum-selection clause where the case is now likely time-barred in the contractual forum are unpersuasive. For example, Mr. Caperton cites *Ernest and Norman Hart Brothers, Inc. v. Town Contractors, Inc.* 18

such reasons as fraud or overreaching. Accordingly, the forum-selection clause should have been enforced by the circuit court, and that court's failure to grant the Massey Defendants' motion to dismiss based upon the forum-selection clause was an abuse of discretion.[31]

5. Retroactivity of the New Forum-Selection Clause. On rehearing, the Harman Companies and Mr. Caperton have argued that the new forum-selection clause principles of law developed in this case should not be applied retroactively to them.[32] They contend, among other things, that

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Mass. App. Ct. 60, 65, 463 N.E.2d 355, 359 (1984). Notably, however, that court's decision was not based solely on the lack of a remedy in the contractual forum state. Rather, the court concluded that the contract at issue was a contract of adhesion. More importantly, the court discussed at length the fact that forum-selection clauses had long been viewed as invalid in Massachusetts, and, at that time, there was no clear indication that Massachusetts would follow the modern view of reasonable and just forum-selection clauses being valid and enforceable. As noted above, in 1981 this Court indicated its approval of reasonable and just forum-selection clauses. *General Elec. Co. v. Keyser*, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981).

[31] We would be remiss if we did not acknowledge that the motivating factor for the Harman Companies and Mr. Caperton to bring the tort claims in West Virginia may have been due to the fact that Virginia has a cap on punitive damages and West Virginia does not. *See* Va. Code § 8.01-38.1 (1987) ("In no event shall the total amount awarded for punitive damages exceed $350,000.00."). Virginia also does not allow punitive damages for contract claims. *See Kamlar Corp. v. Haley*, 224 Va. 699, 705, 299 S.E.2d 514, 517 (Va. 1983).

[32] The Harman Companies briefed this issue in terms of applying the new principles prospectively.

due process principles prohibit such application. We disagree.

To begin, we should make clear that, notwithstanding the due process argument made by the Harman Companies and Mr. Caperton, "[i]t is within the inherent power of a state's highest court to give a decision prospective or retrospective application without offending [federal] constitutional principles." *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). Stated another way,

> [t]he United States Constitution neither prohibits nor requires retroactive application of a judicial decision, and the question of retrospective or prospective application of a state judicial decision to civil litigation in the state courts is a matter of state law when, as here, the rule in question involves a matter of a common-law tort and is not based on federal constitutional or statutory law.

Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 112 (Colo. 1992). *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94, 113 S.Ct. 2510, 2516, 125 L.Ed.2d 74 (1993) ("Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions for near a thousand years.'" (citation omitted)); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."). In addition to there being no federal constitutional impediment to a judicial decision being applied retroactively, there is likewise no state constitutional im-

pediment. *See Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 347, 256 S.E.2d 879, 887 (1979) ("We do not find any provision in the West Virginia Constitution which addresses this point.").

The Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, "[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases." *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004). *See also Alaskan Vill., Inc. v. Smalley*, 720 P.2d 945, 949 (Alaska 1986) ("Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases."); *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 83 Cal.App. 4th 1403, 1422, 100 Cal.Rptr.2d 509, 525 (2000) ("[T]he general rule as to judicial opinions is that they are fully retroactive."); *Findley v. Findley*, 280 Ga. 454, 460, 629 S.E.2d 222, 228 (2006) ("[W]e shall continue to apply the general rule that a judicial decision announcing a new rule is retroactive[.]"); *Aleckson v. Village of Round Lake Park*, 176 Ill.2d 82, 86, 679 N.E.2d 1224, 1226 (1997) ("Generally, when a court issues an opinion, the decision is presumed to apply . . . retroactively[.]"); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 217 104 P.3d 483, 489 (2004) ("Therefore today we reaffirm our general rule that [w]e give retroactive effect to judicial decisions." (internal quotations and citation omitted)); *Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 658, 826 A.2d 577, 580-81 (2003) ("At common law, appellate decisions in civil cases are presumed to apply retroactively."); *Montells v. Haynes*, 133 N.J. 282, 295, 627 A.2d 654, 660 (1993) ("The final issue is whether our decision should follow the general rule of retroactive application[.]"); *Beavers v. John-*

son Controls World Servs., Inc., 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) ("[W]e believe there should be a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively."); *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, 579 Pa. 404, 418, 856 A.2d 43, 51 (2004) ("Our general principle is that we apply decisions involving changes of law in civil cases retroactively[.]"); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992) ("Generally, judicial decisions apply retroactively."); *State v. Styles*, 166 Vt. 615, 616, 693 A.2d 734, 735 (1997) ("We have previously adopted the common law rule that a change in law will be given effect while a case is on direct review, except in extraordinary cases. This rule applies whether the proceedings are civil or criminal."); *In re Commitment of Thiel*, 241 Wis.2d. 439, 449, 625 N.W.2d 321, 326 (Ct. App. 2001) ("Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively.").

Although the common law rule presumes that appellate judicial decisions apply retroactively, "[t]he courts of this country long have recognized exceptions to the rule of retroactivity[.]" *Ashland Oil, Inc. v. Rose*, 177 W. Va. 20, 23, 350 S.E.2d 531, 534 (1986). The seminal case by this Court addressing the issue of an exception to retroactivity is *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

In *Bradley*, this Court was asked to decide whether or not our contributory negligence rule should be modified to allow for comparative negligence. After an exhaustive examination of the history of the contributory negligence doctrine, *Bradley*

found that modification of the doctrine was warranted. In doing so the opinion held,

> [o]ur present judicial rule of contributory negligence is therefore modified to provide that a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident. To the extent that our prior contributory negligence cases are inconsistent with this rule, they are overruled.

Bradley, 163 W. Va. at 342, 256 S.E.2d at 885.

Insofar as *Bradley* overruled prior contributory negligence case law, the opinion addressed the issue of whether or not the new comparative negligence rule would be applied retroactively to cases pending at the time of the decision. To resolve the issue of retroactivity, in the context of new law that overruled prior case law, *Bradley* looked for guidance from the United States Supreme Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled by Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).[33] After examining

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[33] The *Bradley* decision acknowledged a prior principle of law created by the Court that involved retroactivity, but found that prior principle was too narrow. *See* Syl. pt. 2, *Falconer v. Simmons*, 51 W. Va. 172, 41 S.E. 193 (1902) ("An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception,-that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under

relevant language from the opinion in *Chevron*, *Bradley* fashioned the following test:

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

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such construction, the later decision does not retroact so as to invalidate such contract.").

Syl. pt. 5, *Bradley*.

The retroactivity test announced in *Bradley* has been relied upon by this Court whenever the issue of retroactivity has arisen in a civil case. However, the *Bradley* test is narrowly confined to deciding whether to retroactively apply a new principle of law that was created in a case that overruled prior precedent. The narrow constraints of *Bradley* have proved to be problematic whenever this Court has examined retroactivity in the context of a new principle of law created in a case that did not overrule prior precedent. *See, e.g.*, *Richmond v. Levin*, 219 W. Va. 512, 517, 637 S.E.2d 610, 615 (2006) ("[T]he analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]" (internal quotations and citation omitted)); *Adkins v. Cline*, 216 W. Va. 504, 510, 607 S.E.2d 833, 839 (2004) ("The *Bradley* formula does not give specific guidance to our current situation[.]"); *Kincaid v. Mangum*, 189 W. Va. 404, 414, 432 S.E.2d 74, 84 (1993) ("[T]he plaintiffs correctly point out that the analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]"). Because of the limitations imposed by *Bradley* on the issue of retroactivity, we believe that another test, designed to compliment *Bradley*, must be utilized whenever this Court is called upon to examine the issue of retroactively applying a new rule of law from a case that did not overrule any prior decision of this Court. In formulating such a test, we need look no further than the *Bradley* opinion itself.

The retroactivity test created in *Bradley* was fashioned from the following language that appeared in *Chevron* and was quoted in *Bradley*:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Bradley, 163 W. Va. at 347, 256 S.E.2d at 888 (quoting *Chevron*, 404 U.S. at 106-07, 92 S.Ct. at 355 (internal quotations and additional citations omitted)).[34] With the *Chevron* factors as a guide, we now

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[34] The *Chevron* test was overruled in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). In *Harper*, the Supreme Court held that new federal judicial rules would no longer be open for selective retroactivity. The Supreme Court addressed the issue succinctly as follows:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. The rule extends *Griffith's* ban against selec-

hold that in determining whether to extend full retroactivity to a new principle of law, established in a civil case that did not overrule any prior precedent, the following factors will be considered. First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

In the instant proceeding, we are called upon to decide whether or not the principles of law developed in this opinion, involving forum-selection clauses, should be applied retroactively to the parties. Under the test set out above, we find no impediment to applying the new forum-selection clause principles to the parties in this case.

a. The new forum-selection clause principles were clearly foreshadowed. The Harman Companies and Mr. Caperton argue that the new fo-

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> tive application of new rules. Mindful of the basic norms of constitutional adjudication that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.

Harper, 509 U.S. at 97, 113 S.Ct. at 2517 (internal quotations and citations omitted). It has been correctly noted that "although the United States Supreme Court has rejected *Chevron*, the states are free to continue employing the *Chevron* criteria in deciding questions of retroactivity of state law." *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483, 488 (Mont. 2004).

rum-selection clause principles applied in this case were not foreshadowed by any prior decision of this Court. We disagree.

To begin, the Harman Companies and Mr. Caperton misunderstand the meaning of "foreshadowed," as that term is applied in the present context. Foreshadowing does not mean that "there has to be clear precedent before a holding can be considered clearly foreshadowed." *Collins v. Department of Corr.*, 167 Mich. App. 263, 267, 421 N.W.2d 657, 659 (1988). All that is required is some indication by a prior decision of this Court or a national trend that would "put persons on notice that [this Court] could resolve the issue either way[.]" *Id. See also Founder v. Cabinet for Human Res.*, 23 S.W.3d 221, 224 (Ky. Ct. App. 1999) (holding that prior judicial decision put plaintiff "on notice that it was possible that the filing of the complaint with the Commission would bar a separate action in circuit court. Thus, it was not error for the court to retroactively apply [a new decision]."). A case which helps illustrate the broad meaning of "foreshadowing" is *Professional Insurance Corp. v. Sutherland*, 700 So.2d 347 (Ala. 1997).

In *Sutherland*, the plaintiffs sued several defendant insurance companies in an Alabama trial court for tort and breach of contract claims. The defendants filed a motion to dismiss on the grounds that, under the terms of contractual forum-selection clauses between the parties, all causes of action had to be filed in Florida. The trial court denied the motion to dismiss on the grounds that prior Alabama case law held that "outbound" forum-selection clauses were against public policy. The defendants appealed to the Alabama Supreme Court. That Court apparently issued an opinion that was withdrawn after a rehearing was granted. In the rehear-

ing opinion, the Court held that it was overruling prior case law that barred "outbound" forum-selection clauses. More important to the case at hand, the Court addressed the issue of whether or not the new rule would be applied retroactively to the parties before the Court. In finding that the decision would be applied to the parties, *Sutherland* addressed the issue of foreshadowing as follows:

> The plaintiffs contend that when they were negotiating their contracts they relied upon the rule making forum selection provisions invalid in Alabama and that the rule we adopt today represents a fundamental change in the substantive law of this state. Therefore, they claim, an application of the "new" rule against them would be an unfair retroactive application. We disagree.
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> We conclude that it is fair to apply the rule enforcing forum selection clauses to the parties in this case. As noted previously, while American courts traditionally disfavored outbound forum selection clauses, the overwhelming trend, following the United States Supreme Court's decision in *M/S Bremen*, *supra*, has been toward allowing enforcement of those clauses. *That nationwide trend foreshadowed our adoption today of the rule that such clauses are not per se void, providing notice that Alabama might follow suit and thereby reducing the reliance these plaintiffs could reasonably have placed upon the continued viability of the traditional rule in Alabama.*

Sutherland, 700 So.2d at 351-52 (emphasis added).

Although the Alabama Supreme Court relied upon a nationwide trend as foreshadowing its new rule in *Sutherland*, we need not look to a national trend to find that the new forum-selection clause principles developed in this case were foreshadowed. As previously pointed out in this opinion, over twenty-five years ago in *General Electric Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), this Court indicated that forum-selection clauses were not against the public policy of this State. Specifically, we stated in *Keyser*,

> We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed. Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements[.]

Keyser, 166 W. Va. at 461 n.2, 275 S.E.2d at 291 n.2. Clearly, *Keyser* placed the parties in this action on notice that, when presented with an opportunity, this Court would "carefully" analyze all matters relevant to the forum-selection clause presented on appeal. Contrary to the arguments of the Harman Companies and Mr. Caperton, there is no requirement that there must exist specific precedent that foreshadowed exactly how this Court would resolve new issues involving a forum-selection clause. If such a situation was the law in this State or any jurisdiction in the country, there would be very few cases decided on appeal that created new law which could be applied to the parties before the appellate court. This is not the law in the country nor in West Virginia. Consequently, we find that the new forum-

selection clause principles created in this opinion were foreshadowed by *Keyser*.

b. The purpose and effect of the new rules will be enhanced by applying the rules retroactively to the parties. In other parts of this opinion we have discussed the general purpose and effect of forum-selection clauses. The new forum-selection clause principles announced in this decision simply provide parameters for the enforcement of forum-selection clauses. To deny application of those principles to the parties in this litigation would undermine the very essence of forum-selection clauses, which is to require parties and those in privity thereto to litigate claims in a forum voluntarily chosen by them.

c. No substantial inequitable results would flow from applying the new forum-selection clause principles retroactively. We have not been presented with any valid reason to show that applying the new principles would bring about a substantial inequitable result. "Indeed, limiting this decision to prospective application would produce inequitable results[.]" *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, ----, 174 P.3d 270, 274 (2008). This is true because there is no evidence in the record to show that the forum-selection clause involved in this case was not freely bargained for by the actual signatories to the agreement. To allow one signatory to the agreement to escape its effects through prospective application of our new principles would simply be inequitable.

Accordingly, we conclude that the forum-selection clause principles of law adopted by this opinion may properly be applied to the parties to the instant proceeding.

6. The bankruptcy court's order did not have any preclusive effect on the forum selection clause issue. The final matter we must address in this area concerns Mr. Caperton's argument "that the United States Bankruptcy Court for the Western District of Virginia has rendered a final, uncontested ruling specifically finding West Virginia to be the proper forum for this Action."[35] As a result of this alleged final decision, Mr. Caperton contends that the doctrine of collateral estoppel precludes relitigation of the issue in the state court proceedings.[36]

To begin, we note that "[t]here is no question that the doctrines of res judicata and collateral estoppel apply to decisions rendered in Federal Bankruptcy Courts." *Jerome J. Steiker Co., Inc. v. Eccelston Props. Ltd.*, 593 N.Y.S.2d 394, 398 (1992). Further, because Mr. Caperton contends that the bankruptcy proceeding adjudicated the forum selection clause issue, "the federal rules of preclusion must be applied." *Sea Quest Int'l., Inc. v. Trident*

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[35] We have previously noted that the Massey Defendants attempted to intervene in the bankruptcy proceeding filed by the Harman Companies. The purpose of this attempted intervention was "to determine whether the Caperton's (sic) and Harman Development's claims were actually assets of the bankruptcy estates and whether Hugh Caperton was attempting to deprive the bankruptcy estates of those assets improperly." *Caperton v. A.T. Massey Coal Co., Inc.*, 270 B.R. 654, 655 (S.D. W. Va. 2001).

[36] Mr. Caperton also contends that the doctrine of res judicata applies. Insofar as Mr. Caperton is only attacking the disposition of the forum selection clause issue, we need not separately address the res judicata claim. The result would be the same under an analysis of either doctrine.

Shipworks, Inc., 958 So.2d 1115, 1119 (Fla. Dist. Ct. App. 2007). Under federal law, a party asserting collateral estoppel as a bar to relitigating an issue must establish

> (1) the issue to be precluded is identical to the issue already litigated, (2) the issue was actually determined in the prior proceeding, (3) the determination of the issue was an essential part of the decision in the prior proceeding, (4) the prior judgment was final and valid, and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue.

In re Coleman, 426 F.3d 719, 729 (4th Cir. 2005).[37]

We need not labor long on this issue. The second element of collateral estoppel is dispositive of the matter. In order for collateral estoppel to apply to the forum selection clause issue, the matter had to actually be determined in the bankruptcy proceeding. As we shall demonstrate below, it was not.

As previously indicated in this opinion, the Massey Defendants attempted to have the instant case removed to a federal district court in the Southern District of West Virginia. In response to the removal, the Harman Companies and Mr. Caperton asked the federal district court to remand the case to state court. The federal district court issued a written opinion indicating that it would hold in abeyance any ruling about the propriety of the case being in

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[37] The elements required to prove collateral estoppel under West Virginia law are almost identical to the federal elements. *See* Syl. pt. 1, *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996).

federal court until the bankruptcy court made a ruling on the claims asserted by Massey as an intervenor. *See Caperton v. A.T. Massey Coal Co., Inc.*, 251 B.R. 322 (S.D. W. Va. 2000).[38] Subsequent to the bankruptcy court issuing an order that involved Massey's intervention claims, the federal district court issued another written order that interpreted the bankruptcy court's order regarding Massey's claims. The federal district court made the following findings:

> As set forth in its November 28, 2000 Joint Memorandum Opinion, the Bankruptcy Court attempted to respond to this Court's Memorandum Opinion and Order and determined the crucial question was whether Caperton and/or Harman Development have any independent causes of action under West Virginia law. The Bankruptcy Court then clarified what possible claims Caperton and Harman Development might have that are independent and non-derivative of the bankrupt estates' claims. It declined, however, to decide whether such claims have actual, legal validity under West Virginia state law. Instead, the Bankruptcy Court opined this question was better addressed by a West Virginia court, either state or federal, and abstained from deciding the questions presented by the declaratory judgment/adversary proceedings. *Integral to its*

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38 It appears that the federal district court entertained the Massey Defendants' removal petition under its bankruptcy jurisdiction, because of the bankruptcy proceeding that was pending in Virginia.

> *decision to abstain and dismiss the adversary proceedings, the Bankruptcy Court determined the claims of all parties, and defenses thereto, can be adjudicated satisfactorily in the West Virginia action.*

Caperton v. A.T. Massey Coal Co., Inc., 270 B.R. 654, 655-56 (S.D. W. Va. 2001) (emphasis added). As a result of the federal district court's determination that the bankruptcy court abstained from deciding *any* issue involving the Massey intervention claims, the federal district court declined a motion by the Massey Defendants to transfer the case to a federal district court in Virginia. Specifically, the federal district court held that the Massey Defendants' "motion for transfer of venue to the District Court of the Western District of Virginia is DENIED as moot, leaving the Circuit Court of Boone County to decide whether transfer of venue remains for determination." *Caperton*, 270 B.R. at 656.[39]

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[39] In a footnote in Mr. Caperton's supplemental brief he attempts to suggest that the federal district court "found it appropriate for the case to ultimately proceed in West Virginia." The footnote is disingenuous in trying to suggest that the federal district court found that West Virginia had to allow the case to be fully litigated on the merits. The federal district court's order, like the bankruptcy court's order, left it up to the West Virginia courts to decide the merits of all claims and defenses asserted in the state court proceeding.

We should point out that the federal district court abstained from hearing any claim or defense asserted in the state court proceeding under the *mandatory* abstention provision of bankruptcy law, because the state law litigation was not a core proceeding for bankruptcy purposes. Specifically, the federal district court held,

It is generally acknowledged that "the lower federal courts do not have appellate jurisdiction over the state courts and their decisions are not conclusive on state courts, even on questions of federal law." *State v. Robinson*, 82 P.3d 27, 30 (Mont. 2003). *See also Cash Distrib. Co., Inc. v. Neely*, 947 So.2d 286, 292 n.5 (Miss. 2007) ("[S]tate supreme courts are not

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> The Court holds [the Harman Companies' and Mr. Caperton's] claims are non-core because: 1) the claims are not specifically identified as core proceedings under 28 U.S.C. § 157(b)(2); 2) the claims existed prior to the filing of the [Harman Companies'] bankruptcy petitions; 3) the claims are based solely on state law and therefore exist independent of the provisions of Chapter 11; and 4) the parties' rights are not affected by the outcome of the bankruptcy proceedings.

Caperton, 270 B.R. at 657. It is generally recognized that res judicata and collateral estoppel "bar[ ] only claims that would constitute a core claim in an earlier bankruptcy action." *Cabrera v. First Nat'l Bank of Wheaton*, 753 N.E.2d 1138, 1147 (Ill. Ct. App. 2001). *See also I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1548 (11th Cir. 1986) (In "a non-core proceeding, the bankruptcy court could only issue proposed findings of fact and conclusions of law, which would be subject to de novo review by the district court, and such proposed findings would not be entitled to res judicata effect in subsequent litigation because there would have been no final judgment on the merits." (internal citations omitted)); *SMI/USA, Inc. v. Profile Tech., Inc.*, 38 S.W.3d 205, 211 (Tex. Ct. App. 2001) ("Although a bankruptcy judge may hear non-core proceedings and make proposed Findings of Fact and Conclusions of Law to the District Court, the judge may not render a final judgment on such claims. As a result, a bankruptcy court's disposition of non-core proceedings is not res judicata as to subsequent state court proceedings regarding the same claims.").

duty-bound to follow a federal court of appeals' interpretation of federal law."). Thus, the federal district court's interpretation of the bankruptcy court's order is not binding on this Court. Even so, we agree with the federal district court that the bankruptcy court's order did not address the merits of any issue or claim raised by Massey's attempted intervention in the bankruptcy proceeding.[40] The bankruptcy court's Joint Memorandum Opinion made the following findings:

> By this adversary proceeding, Massey seeks a determination of the respective ownership interests of Caperton and the bankruptcy estates of the Debtors in causes of action currently being pursued jointly by Caperton and the Debtors in the West Virginia Action. . . .
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> . . . Massey alleges that Caperton and Harman Development are seeking to enforce for their own benefit alleged claims which are assets solely of the bankruptcy estates of Harman Mining and Sovereign. However, in these proceedings, Massey's real object appears to be to obtain a judicial determination that under West Virginia law Caperton and

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40 Mr. Caperton's res judicata claim would fail because the bankruptcy court did not enter a final judgment on the merits of Massey's intervention claims. *See Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992) ("Res judicata . . . will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same.").

> Harman Development have no independent claims of their own which they can pursue against Massey for its alleged wrongful conduct. Because such a determination can be better rendered in the West Virginia Action, this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum, whether state or federal.
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> . . . Most important to this Court's decision to abstain in these adversary proceedings is that the viability of Caperton's and Harman Development's claims is determined by West Virginia state law and not federal bankruptcy law. Accordingly, all of these issues can be addressed satisfactorily and most appropriately in the West Virginia Action.

Additionally, the bankruptcy court's Joint Order filed with the Joint Memorandum Opinion made the following conclusions of law:

> For the reasons expressed in this Court's Joint Memorandum Opinion entered contemporaneously herewith, in the event that Hugh Caperton and/or Harman Development Corporation are determined to have alleged independent, non-derivative claims pursuant to West Virginia law, those causes of action are hereby DECLARED not to be property of the bankruptcy estate of either Harman Mining Corporation or Sovereign Coal Sales, Incorporated. However, also for the reasons stated in such Joint Memorandum Opinion, this Court ABSTAINS from deciding whether any such claims are properly alleged or have

> legal validity. Accordingly, it is ORDERED that these adversary proceedings are DISMISSED.

Clearly it is evident that the bankruptcy court's Joint Memorandum Opinion and Joint Order did not address the merits of any claim, issue or defense involved in the state court proceeding. Further, "[b]ecause the [forum selection clause] issue . . . was neither decided on the merits nor necessary to support the bankruptcy court's judgment, we agree with [the Massey Defendants] that the doctrines of collateral estoppel and res judicata do not bar [raising the defense] in this case." *Cousatte v. Lucas*, 136 P.3d 484, 491 (Kan. Ct. App. 2006). *See also Kennedy v. First Nat'l Bank of Decatur*, 473 N.E.2d 604, 608 (Ill. App. Ct. 1985) ("[T]he doctrine of collateral estoppel does not bar the issue of whether [plaintiff] was injured individually because (1) such issue was not actually or necessarily decided in the bankruptcy proceeding, and (2) the Bankruptcy Court expressly determined that it had no jurisdiction over such issue."); *Eicher v. Mid Am. Fin. Inv. Corp.*, 702 N.W.2d 792, 810 (Neb. 2005) ("Because [plaintiff's] claim in this case was not barred by the judgment in the prior bankruptcy action under the doctrines of either res judicata or collateral estoppel, the district court erred in granting the motion for partial summary judgment dismissing his claim.").

B. Res Judicata

Although the forum-selection clause is dispositive of this case, we further conclude that, assuming *arguendo* the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata.

In addressing this issue, we are called upon to decide the res judicata effect of the Virginia judgment on the instant West Virginia proceeding. We have previously held that "[u]nder Article IV, Section 1, of the Constitution of the United States, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this State." Syl. pt. 1, *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968). Further, "[b]y virtue of the full faith and credit clause of the Constitution of the United States, a judgment of a court of another state has the same force and effect in this State as it has in the state in which it was pronounced." Syl. pt. 3, *id.* "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that '[t]he validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered.'" *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 474, 513 S.E.2d 692, 701 (1998) (quoting 50 C.J.S. § 969, at 563). Further, "the full faith and credit clause generally requires the courts of this State to give [a foreign] judgment at least the res judicata effect which it would be accorded by [the foreign] courts." *Jordache Enterprises*, 204 W. Va. at 476, 513 S.E.2d at 703. *See also Martin v. SAIF Corp.*, 167 P.3d 916, 918-19 (Mont. 2007) ("Full faith and credit generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." (internal quotations and citation omitted)).

Before discussing the specific elements that must be established in order for the preclusive effect of res judicata to apply under Virginia law, we must first address a preliminary issue. Under the laws of Vir-

ginia, "a judgment is not final for the purposes of res judicata . . . when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992). In the instant case, it appears that a trial court judgment in the Virginia proceeding was entered on May 7, 2001. Subsequently, on April 1, 2002, Massey filed a motion for summary judgment with the West Virginia circuit court, arguing that principles of res judicata required dismissal of the West Virginia case as a result of the judgment in the Virginia case. On June 17, 2002, the circuit court denied the motion. The circuit court was correct in denying summary judgment on res judicata grounds because, at the time Massey filed its motion and the circuit court decided the matter, the Virginia judgment was being appealed by Wellmore. As we have pointed out, under Virginia law "a judgment is not final for *res judicata* purposes if it is being appealed." *CDM Enters., Inc. v. Commonwealth/Manufactured Hous. Bd.*, 32 Va.App. 702, 709, 530 S.E.2d 441, 445 (2000) (emphasis in original).

The Virginia judgment did not become final for purposes of res judicata until September 13, 2002, when the Supreme Court of Virginia dismissed Wellmore's appeal. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002) (dismissing appeal). Consequently, the issue we now confront is whether or not this Court may recognize the finality of the Virginia judgment, for purposes of addressing the res judicata issue on appeal. A case squarely addressing this issue is *Aronow v. Lacroix*, 268 Cal.Rptr. 866, 219 Cal.App.3d 1039 (1990).

The facts of *Aronow* involved two separate lawsuits filed by different plaintiffs against the same law firm for malicious prosecution.[41] One lawsuit was filed by Dr. Ann Fitzsimmons, and the other was filed by Betty Aronow. In the case brought by Dr. Fitzsimmons, a judgment was rendered in favor of the law firm on January 27, 1981. However, as a result of an appeal, the case was not finally disposed of until June 24, 1987. The action brought by Ms. Aronow went to trial on October 5, 1982. Prior to trial the law firm raised the issue of res judicata, but the trial court found that res judicata did not apply because Dr. Fitzsimmons' case was pending an appeal and therefore had not become final. A jury ultimately returned a verdict in favor of Ms. Aronow and awarded her damages. The law firm appealed the judgment. While the case was pending on appeal, Dr. Fitzsimmons' case became final after an appellate court rendered a decision affirming the verdict in favor of the law firm. As a result of Dr. Fitzsimmons' case becoming final, the law firm raised the issue of res judicata in the appeal of Ms. Aronow's case. The appellate court in *Aronow* found that the issue could be raised on appeal:

> First, we consider the question of a final judgment on the merits. At the time the court trial of [Ms. Aronow] began, [Dr. Fitzsimmons' case] was on appeal, so there was no final judgment . . . on which [the law firm] could rely to raise a res judicata defense in the trial court. . . . However, . . . our affirmance of the judgment in [the law firm's] fa-

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41 Both plaintiffs had been sued by the law firm in a previous action.

> vor [became] final, . . . on September 28, 1987, while the present appeal was pending.
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> Under these circumstances, [the law firm] now ha[s] a final judgment on which to base a claim of res judicata, and they can raise the issue on appeal. Although normally the res judicata effect of a prior judgment must be pleaded and proven at trial, when the judgment becomes final during the pendency of an appeal in another action, the first final judgment may be brought to the attention of the appellate court in which the appeal is pending and may there be relied on as res judicata.

Aronow, 268 Cal.Rptr. at 870, 219 Cal.App.3d at 1046 (internal quotations, citations, and footnote omitted). The appellate Court in *Aronow* went on to analyze the case under res judicata principles and found that the doctrine applied "to preclude [Ms.] Aronow from a judgment in her favor in her own case." *Aronow*, 268 Cal.Rptr. at 875, 219 Cal.App.3d at 1053.

In accordance with *Aronow*, we now hold that a party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal. Although our holding on this issue permits us to exercise our inherent authority to consider Massey's res judicata argument, we believe the decisions of the Supreme Court of Virginia demonstrate that that Court would also exercise its inherent authority to address the issue under the facts presented.

The decision by the Supreme Court of Virginia in *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (1941), is instructive of how we believe that Court would re-

spond to the issue of res judicata raised in this case. The facts of *Ward* show that James R. Ward drove his car into the rear of a tractor being driven by Henry Harper. The tractor was owned by Sidney Charlton. Mr. Ward sued Mr. Charlton, and, in a separate action, Mr. Harper sued Mr. Ward. Mr. Ward also brought a counter-claim against Mr. Harper.

In Mr. Ward's suit against Mr. Charlton, a jury returned a verdict in favor of Mr. Ward. However, the trial court set aside the verdict and granted judgment to Mr. Charlton. Mr. Ward appealed. While Mr. Ward's appeal was pending, a jury decided the case brought by Mr. Harper. In that case, the jury determined Mr. Harper was not entitled to recover from Mr. Ward, and Mr. Ward was not entitled to recover from Mr. Harper on the counter-claim.

As a result of the disposition of the Harper-Ward lawsuit, Mr. Charlton asked the Supreme Court of Virginia to dismiss Mr. Ward's appeal on res judicata grounds. Mr. Charlton took the position "that since it has been adjudicated by a court of competent jurisdiction that Ward . . . can not recover of Harper, the original tort feasor, *a fortiori* Ward can not recover of Harper's master, Charlton, whose liability, if any, depends entirely upon the liability of Harper, under the doctrine of respondeat superior." *Ward*, 177 Va. at 106, 12 S.E.2d at 792. In response, Mr. Ward argued, among other things, that Mr. Charlton could not raise the defense of res judicata for the first time on appeal. The Supreme Court of Virginia disagreed:

> The present [appeal] presents the sole question as to whether Ward is entitled to a judgment against Charlton by reason of the

alleged negligent acts of Charlton's servant, Harper. The petition for a writ of error prays that the verdict which Ward obtained against Charlton and which the trial court set aside, be restored, and that this court enter a final judgment on said verdict against Charlton. It conclusively appears from extrinsic evidence, which is not controverted, that subsequent to the closing of the record in the instant case a court of competent jurisdiction has determined that Ward is not entitled to recover the judgment which he here seeks.[42]

Must this court shut its eyes to these admitted facts and sagely proceed to consider an issue which has already been decided by a court of competent jurisdiction, and possibly enter a final judgment directly in conflict with that already rendered? We think not. In our opinion this court has the jurisdiction and it is its duty to examine this extrinsic evidence in determining whether it will proceed to hear the pending matter or dismiss it because the issue between the parties has been settled.

. . . .

It is true, as argued by the learned counsel for [Ward], that an appellate court in reviewing the record of the proceedings in the court below will not entertain the defense of res ju-

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42 It should be pointed out that, at the time of this case, the Supreme Court of Virginia had not adopted the rule that a judgment is not final for the purposes of res judicata when it is being appealed. This rule was first adopted in 1992, in *Faison v. Hudson*, 417 S.E.2d 302 (Va. 1992).

dicata if it was available and was not made below. This is so because the defense is an affirmative one and if not asserted below is deemed to have been waived. . . .

But this principle does not apply to the instant case where the defense was not available and could not have been asserted during the trial below.

. . . .

The doctrine of res judicata or estoppel by judgment is based on public policy. . . . It proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. . . .

The doctrine is firmly established in our jurisprudence and should be maintained where applicable. . . .

Here it has been brought to our attention by undisputed evidence that since the trial below another court of competent jurisdiction has finally adjudicated that the plaintiff in error, Ward, is not entitled to a judgment against Charlton, the defendant in error. Hence, the plaintiff in error is estopped to ask this court to review the record before it and to enter in his favor a judgment. . . .

Ward, 177 Va. at 110-15, 12 S.E.2d at 793-96 (internal quotations and citations omitted) (footnote added).

Clearly, under the decision in *Ward*, the Supreme Court of Virginia would address the issue of res judicata presented in this case, even though the doctrine did not become ripe until the case was presented on appeal. Consequently, we find that, although the circuit court was correct in denying summary judgment to Massey on res judicata grounds because the Virginia judgment was pending appeal, this Court may now address the issue anew because a final judgment was rendered in the Virginia case by the time this appeal was prosecuted.

The Supreme Court of Virginia has described the doctrine of res judicata, and its purpose, as follows:

> the rationale for this judicially created doctrine [is that] it "rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties. . . . The doctrine prevents 'relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.'"

City of Virginia Beach v. Harris, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000) (quoting *Bill Greever Corp. v. Tazewell Nat'l Bank*, 256 Va. 250, 254, 504 S.E.2d 854, 856 (1998)) (additional citation omitted). *See also Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992) ("The bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." (citing *Bates v.*

Devers, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974); *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493, 495 (1988); *Brown v. Haley*, 233 Va. 210, 215, 355 S.E.2d 563, 567 (1987); and *Worrie v. Boze*, 198 Va. 533, 537-38, 95 S.E.2d 192, 196-97 (1956), *aff'd on reh'g*, 198 Va. 891, 96 S.E.2d 799 (1957))).

With respect to the application of res judicata, the Virginia Court has been consistent in holding that

> [f]our elements must be present before *res judicata* can be asserted to bar a subsequent proceeding: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). *See also Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

Smith v. Ware, 244 Va. at 376, 421 S.E.2d at 445. *See also State Water Control Bd. v. Smithfield Foods, Inc.* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001) (same); *Balbir Brar Assoc., Inc. v. Consolidated Trading & Servs. Corp.*, 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996) (same). We will address each of these elements in turn.

1. Identity of the remedies sought. The Harman Companies argue that because the Virginia proceeding awarded damages for breach of contract, while the instant action awarded damages in tort, the remedies sought in these two actions are not the same. We disagree.

The Supreme Court of Virginia has not squarely defined what is meant by "identity of the remedies

sought" for purposes of the res judicata test. *Ware*, 244 Va. at 376, 421 S.E.2d at 445. However, in the *Ware* case, the Court addressed the issue of whether there was identity of remedies, and concluded that because the earlier action sought relief in the court of law, while the latter action sought equitable relief in the court of chancery, there was no identity of remedy: "Mrs. Smith, in her motion for judgment for unlawful detainer, sought the remedy of possession and damages. . . . Mrs. Smith, in her bill of complaint, does not seek possession of the property. Rather, she seeks a commutation of her dower interest, which is a different remedy." *Ware*, 244 Va. at 376-77, 421 S.E.2d 445-46.[43] Thus, it appears that the "remedy" element of res judicata refers, at least in significant part, to the distinction between legal and equitable remedies. The legal definition of the term "remedy" supports this view. *See, e.g., Black's Law Dictionary* 1296 (7th ed. 1999) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief").

Our conclusion is further supported by the opinion in *Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996), wherein the Circuit Court of Virginia explained the concept in this way:

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[43] Until January 2006, Virginia continued to separately recognize actions at law and actions in chancery. However, that distinction was abolished as of January 1, 2006. *See Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 517 n.6, 643 S.E.2d 136, 145 n.6 (2007) ("As of January 1, 2006, Virginia abolished the procedural distinctions between actions at law and suits in chancery.").

At first brush [*Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986),] appears to [be] a retrenchment in the scope of the doctrine of res judicata by its addition of the requirement of "identity of remedies," because if remedy were synonymous with "right of action," the implication is that the aggrieved party, confronted with a judgment for the defendant, may simply successively file actions based on different remedies or rights of action until he receives a favorable verdict. If this were true, the doctrine of Res Judicata would be substantially emasculated.

Black's Law Dictionary (5th ed. 1979) defines remedy as "the rights given to a party by law or by contract which that party may exercise upon a default by the other party, or upon the commission of a wrong (a tort) by another party," so remedy in this context is actually consonant with the broader concept of "cause of action." Moreover, the Supreme Court in *Ware v. Smith*, [244 Va. 374, 421 S.E.2d 444 (1992)], noted that the causes of action were different and relied upon *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974), which clearly held:

> Res judicata-bar, is the particular preclusive effect commonly meant by the use of the term "res judicata." A valid, personal judgment on the merits in favor of a defendant bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties

> and their privies. *See* Restatement of Judgments 47, 62, 83 (1942).
>
> Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action.
>
> *The ostensibly inconsistent rule of this case derives from the fact that Virginia still recognizes a distinction between law and equity, and this legal relic affects the court's res judicata decisions. In Ware v. Smith, supra*; *Brown v. Haley*, 233 Va. 210, 219, 355 S.E.2d 563 (1987) (equitable claim for easement arose from different transaction and could not be asserted in earlier ejectment action at law between the same parties); and *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (prior chancery suit for injunction does not bar later suit for monetary damages, the court was confronted by later cases being filed on a different side of the court, because of the dichotomy between law and equity[)]. . . .

1996 WL 1065553, at *10 (emphasis added). *See also Davis v. Marshall Homes, Inc.*, 265 Va. 159, 175, 576 S.E.2d 504, 512 (2003) (Kinser, J., dissenting) ("Nor was there an identity of remedies [in *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563 (1987),] because the two claims could not have been brought in one proceeding. If the Haleys had asserted what would have been a counterclaim in the ejectment action, the court could not have granted the requested relief regarding the easement in that action *since the relief was equitable in nature and the ejectment action was at law*. [*Brown*] at 218, 355 S.E.2d at 568." (emphasis added)).

With respect to the case presently before us, both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA. Accordingly, the identity of remedy element of Virginia's res judicata test has been met.

2. Identity of the cause of action. The Harman Companies contend that the breach of contract cause of action litigated in Virginia differs from the tort claims asserted in the instant action. In reaching this conclusion, the Harman Companies argue that the proper standard to be applied is the "same evidence" test set out in *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003). We disagree.

To decide the proper rule to be applied in addressing this issue, we look to the Virginia law in effect at the time the complaint was filed in the Circuit Court of Boone County in October, 1998.[44] At that time, Virginia applied the transactional approach to determine whether there was identity of the cause of action for purposes of res judicata. *See Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986). In *Allstar*, the City of Alexandria, Virginia, had initiated a bidding process to procure a contract to tow vehicles in the City. Allstar Towing, Inc., was the only company to submit a bid, but the

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[44] We believe the Virginia Supreme Court would likewise apply the procedural rule in existence at the time the complaint was filed. *See, e.g.*, Rule 1:6 of the Rules of the Supreme Court of Virginia (making new res judicata rule applicable to "all Virginia judgments entered in civil actions *commenced* after July 1, 2006" (emphasis added)).

company was declared ineligible because Allstar "was not a registered corporation" on the bid opening date. *Id.* at 422, 344 S.E.2d at 904. Allstar's certificate of incorporation was issued by the State Corporation Commission the following day. Allstar petitioned the circuit court for an appeal of the determination of ineligibility, or in the alternative, an award of the "'reasonable profits' which it would have earned 'over the course of the prospective agreement.'" *Id.* Allstar also sought a temporary injunction to prevent the city from awarding a towing contract. The circuit court denied both the petition for appeal and the motion seeking injunctive relief. Meanwhile, the City requested and accepted bids for a towing contract a second time. Allstar again submitted a bid, but the contract was awarded to another company, Franconia Towing & Storage. Allstar then filed a second action against the city in the circuit court alleging that Franconia had failed to meet the city's specifications, which Allstar had met. Allstar sought damages "representing 'lost income that it would have received . . . had the contract been awarded to it.'" *Id.* at 423, 344 S.E.2d at 905. The circuit court ruled that, under the principles of res judicata, the second action was barred by the earlier action. Allstar appealed the case to the Supreme Court of Virginia, where that court found that the second action was not barred, as "the same cause of action was not involved in the two cases." *Id.* at 425, 344 S.E.2d at 906. The Supreme Court of Virginia found that "[i]n the first case, Allstar sought relief because the City had determined it to be a 'non-responsible' bidder," based on its lack of a certificate of incorporation; while in the second action Allstar sought relief in connection with a second invitation to bid, which it claimed was improperly awarded to a

contractor who failed to meet the city's specifications. *Id.* The Allstar Court then concluded that the second action asserted by Allstar was not barred by the first because "the facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits on December 31, 1984." *Id.* In reaching its conclusion, the Supreme Court of Virginia adopted the transactional approach when it announced that "[f]or the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen out of a definable factual transaction.'" *Id.* (internal citation omitted)).[45]

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[45] Subsequently, in 2003, the Supreme Court of Virginia handed down an opinion that significantly changed how that Court defined the term "cause of action" for purposes of *res judicata*. *See Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003) (adopting the "same evidence test" by concluding that fraud claim did not bar subsequent breach of contract claim involving same deed of trust notes, and commenting that "[t]he mere fact that some evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of res judicata, mean that plaintiff only has one cause of action. Evidence of defendants' failure to satisfy the deed of trust notes does not prove that defendants made false representations of the values of the real properties intentionally and knowingly, with the intent to mislead plaintiff. Evidence of defendants' failure to satisfy the deed of trust notes does not establish plaintiff's reliance upon defendants' alleged misrepresentations."). The Harman Companies' assertion that we should apply the *Davis* case in resolving this issue is misplaced, as the *Davis* opinion had not yet been handed down at the time the Harman Companies filed their complaint in this action. Moreover, we believe that the *Davis* opinion was a temporary aberration in Virginia law that rejected the existing transactional approach and developed a new "same evi-

The transactional approach has also been explained as follows:

> As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, '24 for purposes of defining "cause of action." The importance of understanding the broad concept of "cause of action" is essential to understanding the application of res judicata. One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, *if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.*" There can be no right of ac-

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[Footnote continued from previous page]

dence" rule. *See Davis*, 265 Va. at 180, 576 S.E.2d at 515 (Kinser, J., dissenting) ("In truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside. Despite rejecting a transactional approach and overruling *Allstar Towing*, the majority, nevertheless, utilizes the Allstar Towing definition of the term 'cause of action,' and the majority states that its decision is supported by the holding in that case."). In 2006, the Supreme Court of Virginia adopted Rule 1:6, through which the Virginia Supreme Court rejected the *Davis* "same evidence" rule and returned to the transactional approach previously applied in Virginia when addressing the element of res judicata requiring identity of the cause of action. *See Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va.App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (observing that the transactional approach adopted by Rule 1:6 was promulgated to supersede the holding in *Davis*).

tion until there is a cause of action." *Stone v. Ethan Alan*, 232 Va. 365, 368-369, 350 S.E.2d 629 (1986), citing *Caudill v. Wise Rambler*, 210 Va. 11, 13 168 S.E.2d 257, 259 (1969). However, as broad as the application of the doctrine of res judicata is, it applies only to rights of action which have accrued from the cause of action and could have been asserted in the proceeding upon which the plea is based. As the Supreme Court of Virginia noted in *Southern. R. Co. v. Wash. & C.R. Co.*, 102 Va. 483, 491, 46 S.E. 784 (1904):

> [R]es judicata applies, except in special cases, *not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Diamond State Iron Co. v. Rarig & Co.*, 93 Va. 603, 25 S.E. 894, and authorities cited. But it cannot be applied to a matter not adjudicated in a former action and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former or their privies, if the causes of action are not the same. (cites omitted).

Cherokee Corp., 1996 WL 1065553, at *8 (emphasis added). *See also Virginia Imports*, 50 Va. App. at 410 n.6, 650 S.E.2d at 561 n.6 ("Under settled prin-

ciples, the 'effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which *properly belonged to the subject of litigation and which the parties, by the exercise of reasonable diligence, might have raised at the time.*' *Smith v. Holland*, 124 Va. 663, 666, 98 S.E. 676, 676 (1919) (emphasis added).").

Turning to the case at bar, although the Virginia proceeding addressed contract claims, while the instant proceeding addressed tort claims, this distinction is of no moment. Both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from the same "conduct, transaction or occurrence," namely the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants. Thus, the tort claims asserted in this action arise from the same transactional facts as the Virginia proceeding and should have been asserted in that proceeding.

3. Identity of the parties. Mr. Caperton and Harman Development were not parties to the Virginia action, and neither were any of the Massey Defendants named in the instant suit. The Harman Companies argue that there is no identity of the parties as there is no privity between the Massey Defendants and Wellmore. We disagree, finding there is identity of the parties between the Virginia proceeding and the instant proceeding under the doctrine of privity.

Pursuant to Virginia law,

> [t]he doctrine of *res judicata* applies not only to the actual parties in a case but also to those in privity with them. *See City of Vir-*

> *ginia Beach v. Harris*, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000). In other words, res judicata applies to anyone " 'so identified in interest with [a party] that he represents the same legal right, precisely the same question, particular controversy, or issue.' " *Johnson*, 7 Va.App. at 618, 376 S.E.2d at 788 (citation omitted).

CDM Enters., Inc. v. Commonwealth / Manufactured Housing Bd., 32 Va.App. 702, 710, 530 S.E.2d 441, 445 (2000). One Virginia court has explained the requirement for the identity of parties in this way:

> "One of the fundamental prerequisites to the application of the doctrine of *res judicata* is that there must be an identity of the parties between the present suit and prior litigation asserted as a bar. A party to the present suit, to be barred by the doctrine, must have been a party to the prior litigation, or represented by another so identified in interest that he represents the same legal right." *Dotson*, 232 Va. at 404-405, 350 S.E.2d at 644.
>
> > There is no fixed definition of privity that automatically can be applied in all cases involving *res judicata* issues. While privity generally involves a party so identified in interest with another that he represents the same legal right, a determination of . . . who are privies requires a careful examination of the circumstances of each case.
>
> *Nero v. Ferris*, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981).

In *Patterson v. Saunders*, the Supreme Court stated:

> It is generally held that "'privity' means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights, and the term 'privy,' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial."

194 Va. at 613, 74 S.E.2d at 208 (citation omitted).

Commonwealth ex rel. Gray v. Johnson, 7 Va.App. 614, 619, 376 S.E.2d 787, 789 (1989).

Turning to the case *sub judice*, we find that the parties to the Virginia proceeding "are so identified in interest" with the parties to the instant proceeding that they "represent the same legal right[s]." *CDM Enters., Inc.*, 32 Va.App. at 710, 530 S.E.2d at 445 (internal quotations and citations omitted). In the Virginia proceeding, Harman Mining and Sovereign sued Wellmore for breach of contract related to the wrongful declaration of *force majeure* under the 1997 CSA. It bears reiterating that all of the harm that has been claimed by Mr. Caperton and the Harman Companies in the instant action has stemmed directly from that wrongful declaration of *force majeure* under the 1997 CSA. Because the question of whether the declaration of *force majeure* was wrongful was the exact issue addressed in the Virginia proceeding, the interests of the various parties to the instant suit, which also depends upon the propriety of the declaration of *force majeure*, is directly aligned

with the interests of the related corporate entities who participated in the Virginia action.

Moreover, it has been recognized that a parent company is in privity with its subsidiary. *See Mullins v. Daily New Leader*, 2001 WL 1772679, at *2 (Va. Cir. Ct. Oct. 24, 2001) ("The Daily News Leader and Gannett Co., Inc., are in privity as Gannett is the parent company of the Daily News Leader."). Thus, Harman Development is plainly in privity with its subsidiaries, Harman Mining and Sovereign, who were parties to the Virginia action. Mr. Caperton is also in privity with Harman Mining and Sovereign to the extent that he signed the 1997 CSA in his capacity as president of Sovereign, and insofar as Harman Mining and Sovereign are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Likewise, A.T. Massey Coal Company is in privity with its subsidiary Wellmore, as are the remaining Massey Defendants, who are also subsidiaries of Massey and sister corporations to Wellmore.

4. Identity of the quality of the persons for or against whom the claim is made. As previously indicated, for purposes of res judicata, Virginia requires a determination be made of the identity of the quality of the persons for or against whom the claim was made. As explained by a Virginia trial court, "[t]he 'identity of quality' element is a requirement that the parties in conflict appear in the identical capacities or on 'the same side of the versus' in both proceedings." *Winchester Homes, Inc. v. Hoover Universal, Inc.*, LAW NO. 122509, 1994 WL 1031408, at *2 (Va. Cir. Ct. Nov. 2, 1994) (citing *Greene v. Warrenton Prod. Credit Ass'n*, 223 Va. 463, 291 S.E.2d 209 (1982)). The facts of the instant case clearly establish that this element has been met.

The original plaintiffs in the Virginia suit are plaintiffs in the West Virginia proceeding, and they sued in the same capacity in both litigations. None of the Massey Defendants in the instant proceeding was a plaintiff in the Virginia proceeding. *See Byrum v. Ames & Webb, Inc.*, 196 Va. 597, 85 S.E.2d 364 (1955) (finding that prior litigation was not res judicata to subsequent litigation because plaintiff and defendant were both nonadversarial defendants in the prior litigation); *Ezrin v. Stack*, 281 F. Supp.2d 67 (D.D.C. 2003) (applying Virginia law to find that res judicata applied where both parties were on opposite sides of the "v." in prior litigation).

5. Preclusive Effect of Res Judicata. Because the four elements of res judicata have been met in this case, as demonstrated above, we conclude that the instant action is barred.

IV.

CONCLUSION

For the reasons stated in the body of this opinion, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing this case against A.T. Massey Coal Company and its subsidiaries with prejudice.

Reversed and remanded.

Chief Justice MAYNARD and Justice STARCHER, deeming themselves disqualified, did not participate in the decision of this case.

Judge COOKMAN and Judge FOX, sitting by temporary assignment.

Justice ALBRIGHT and Judge COOKMAN dissent and reserve the right to file dissenting opinions.

Acting Chief Justice BENJAMIN and Judge FOX concur and reserve the right to file concurring opinions.

ALBRIGHT, Justice, and COOKMAN, Judge, sitting by special assignment, dissenting:

This case is before the Court on rehearing granted after the five elected Justices on the Court, while disagreeing about the proper ultimate outcome of the case, unanimously agreed that defendant **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Caperton v. A.T. Massey Coal Co., Inc.*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007), withdrawn.

Nevertheless, on a vote of three for and two against, the original Court reversed the judgment of the Circuit Court of Boone County, which awarded Plaintiffs (Appellees here) over $50 million, plus interest and costs, on account of that egregious conduct. The majority explained its rejection of the lower court's judgment by saying **"we simply cannot compromise the law in order to reach a result that clearly appears to be justified."** *Id.*

After that opinion was filed, two of the elected Justices recused themselves from further consideration of the case. A motion to rehear the case was granted by this Court on the unanimous vote of the remaining three Justices and two circuit judges, Judge Cookman and Judge Fox, appointed by acting Chief Justice Benjamin. Now, the reconstituted Court has again reversed the lower court by a vote of three (Davis, J.; Benjamin, J., and Fox, J.) to two (Albright, J. and Cookman, J.)

Today's "new" opinion of the Court rests on the same indefensible legal grounds as the original opin-

ion-supplemented by even more extended discussion of some of the points-but, strangely, omitting the clearly correct assertion in the original majority opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id.* This time the majority stands silent regarding any disdain of Massey's conduct. Once again it bends the law to deny Plaintiffs the proper **"result that clearly appears to be justified."** *Id.*

For the record, we wholeheartedly embrace the determination of this Court in the original, now withdrawn, opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id.* Likewise, we do not shrink from saying without reservation that this Court should now affirm the judgment against the Massey Defendants for the reasons outlined in this dissent. Moreover, the failure of the Court now to even acknowledge the justice of Plaintiffs' case below, as it had in the previous opinion, underlines the result-driven nature of the current majority opinion. *Id.*

In terms of the law, the errors of the majority opinion are not complex or difficult to explain. They are few in number.

First, under our law as it existed before the majority decision in this case, the proper inquiry regarding the enforceability of a forum selection clause in a contract was whether, with careful analysis, its enforcement was reasonable and just in the circumstances of the case. In this case it was not.

Second, under the law of Virginia as it existed at all times relevant to the case before us, res judicata applied when, under the facts of the case, all of the issues fairly arising under the facts pled, or which could have been pled, could have been proved with

the same evidence. In the case before us, several occurrences and transactions between the parties to this case, which were not involved in the original Virginia contract action, required substantial amounts of evidence which would not have been relevant in the Virginia contract action.

Finally, under West Virginia law as it existed before the majority opinion was filed in this case, the decision of a lower court on the venue questions raised by a plea of res judicata were to be reviewed under an abuse of discretion standard, evaluating the lower court's application of the law to the facts, not *de novo*, as the majority has now ruled.

The more narrow and focused legal arguments and supporting facts of the rehearing process make it all the more clear that (1) Massey's conduct was outside the bounds of human decency and respectable business practices, and (2) the law poses no barrier to upholding the Boone County jury verdict finding such behavior repugnant and deserving of redress. As opposed to simply deciding the case on the facts and law as they existed at the time the events complained of occurred, the majority kneads the facts so that they better fit the new law the majority finds necessary to create not only for West Virginia but also for Virginia. As we explain in detail below, neither res judicata principles nor the presence of a forum selection clause serve as an impediment to upholding the lower court's actions and jury verdict. Instead, the majority decision now ignores the admitted injustice done to Plaintiffs. It fashions no less than nine new points of law to achieve the result desired by the majority. To accomplish this goal, the majority:

1. Broadly endorses forum selection clauses, makes them applicable to persons not party to the contracts containing such clauses, removes any hint of the cautious, limited approval of such clauses in our jurisprudence, extends their effect to causes of action in which the related contract is but one of several factors justifying recovery, and charges those who would resist their application with the obligation of proving them unreasonable-even when the time for adducing evidence to meet that new requirement has irretrievably passed-making it impossible for Plaintiffs to defend their $50 million judgment.

2. With respect to the principle of res judicata-whether a prior suit adjudicated or could have adjudicated the issues raised in a suit filed later-the majority now makes the lower court's decisions reviewable *de novo*, that is, removing any requirement that this Court give any deference to the lower court's consideration of the proper application of the law to the facts of a particular case. In that regard, the majority opinion now opens the door to this Court systematically reviewing all such decisions of lower courts without regard to the reasonable discretion of the trial courts and their view of the applicable facts.

3. Lastly, this Court imperially found in the majority opinion that the law of Virginia on the issue of res judicata has been clearly settled from 1998 through 2002. Any fair review of the cases in Virginia and the course of development of Virginia law demonstrates beyond doubt that Virginia law in that time frame would not deprive the Circuit Court of Boone County of venue in the cause before us to hear and determine and grant the relief **"Massey's conduct warranted. . . ."** *Caperton*, 2007 WL 415960,

Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

I. DISCUSSION OF THE FACTS

Nothing so completely highlights the errors of the majority opinion and the outright injustice of its result as a thorough review of the evidence admitted in the trial of this case. In the forty-page order denying Appellants (Defendants below) judgment as a matter of law or a new trial, that is, refusing to overturn the jury verdict in this case, the lower court found that there was sufficient evidence from which the jury could have found that the coal supply agreement containing the forum selection clause was but one factor in a far-reaching scheme by which Massey set out to ruin Harman Mining and its owner Hugh Caperton-beginning before Massey's involvement with the coal supply agreement and ending after Massey's brief ownership of a company party to that agreement.

In its order, the Circuit Court of Boone County said "[T]he weight of the evidence at trial fairly established and was clearly sufficient for the Jury" to conclude that:

> **Massey chose to acquire [United Coal Company] in order to eliminate a competitor and to gain more access to LTV [Steel Corporation], ... [while] fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend.**

In paragraph 4 of that order, the trial court further said that the weight of the evidence at trial

fairly established and was clearly sufficient for the jury to further conclude that:[1]

[a] The Corporate Plaintiffs (collectively "Harman") formerly were in the business of mining and selling high quality metallurgical coal produced from the Harman Mine. The Defendants (collectively "Massey") are also in the business of mining and/or selling metallurgical coal. Harman and Massey were competitors.

[b] Massey desired, among other things, to gain LTV Steel Corporation ("LTV") as a new customer.

[c] For years, LTV had purchased substantial amounts of metallurgical coal from United Coal Company ("UCC"). The coal that LTV preferred and purchased from UCC was a premium blend of Harman coal and other, lesser quality coals (the "UCC/Harman blend") Coal from the Harman Mine is metallurgical coal with very favorable cooking characteristics prized by steelmakers like LTV.

[d] For many years, Harman sold all of its coal to one of UCC's subsidiaries, Wellmore Coal Corporation ("Wellmore"), which was, in turn, supplied to LTV as part of the UCC/Harman Blend. During the relevant time period, Harman had a long-term coal supply agreement with Wellmore. Harman was al-

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[1] This opinion will now directly quote extensively from the lower court's very thorough order. It will not cite to particular pages or utilize in all cases the conventional means of indicating quotations, such as quotation marks, double indentations, and single spacing. However, the full text of the order is attached to this dissenting opinion as an appendix. We are grateful to Judge Jay Hoke of the 25th Judicial Circuit, sitting in the Circuit Court of Boone County, for his exhaustive review of the evidence.

most exclusively reliant on that contract. Wellmore's management had always encouraged Harman to mine and sell to it as much coal as it possibly could. Harman had been supplying Wellmore with its high quality metallurgical coal on a continuous basis for many years.

[e] For years, Massey wanted the LTV business and tried to increase sales of coals from its production sources ("Massey Mines") to LTV, but with little success. So Massey chose to acquire UCC in order to eliminate a competitor and to gain more access to LTV, but fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend. In a document written prior to Massey's purchase of UCC, Massey characterized the situation as follows:

> In layman's terms, the UCC metallurgical coal quality is equivalent to Massey's premium Marfork coal, but is further enhanced by having a higher inerts level and a lower sulfur content. UCC had achieved a particularly enviable supplier relationship with LTV Steel Corporation ("LTV") that has now been in place for over 10 years. Surprisingly, the LTV relationship is not secured by a long-term contract, but rather by annual purchase orders that are consistently renewed at favorable pricing levels because of LTV's high regard for the UCC coal quality.
>
> * * *
>
> UCC's decree [sic] of dependence on the Harman mining coal is obviously a sensitivity, since that source represents about 40% of the annual shipment level at Wellmore No. 7, and has become a fairly critical ingredient in

> the LTV coal blend. The term of the Harman mining purchase commitment runs through the year 2001. . . .

[f] Massey knew that there were risks associated with its acquisition. In a pre-acquisition document assessing those risks, Massey stated, "The most significant risk associated with this transaction is that the plus-10-years-old supplier relationship between LTV and UCC may not continue under Massey ownership."

[g] In that same document, however, Massey noted that it would enjoy a very favorable economic outcome if it could cause LTV to purchase coal from Massey Mines, instead of the UCC/Harman Blend, at the price LTV was paying for UCC/Harman coal.

[h] Recognizing that Harman coal was a critical ingredient in the coal blend that LTV preferred, and knowing that LTV in the past had chosen not to purchase much coal from Massey, Massey nonetheless went ahead and purchased UCC. Further, recognizing that "LTV is extremely reluctant to change a long-established, successful coal blend", Massey nonetheless went ahead and marketed coals from Massey Mines to LTV to replace the Harman blend that LTV preferred.

[i] Massey provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract, despite the fact that, historically, LTV preferred multiple suppliers and did not utilize multi-year, long-term coal supply contracts. The price that Massey quoted for it is [sic] coals to LTV constituted a "handsome improvement" over the prices it had been receiving for its coals.

[j] Massey's marketing strategy resulted in a loss of the LTV business-a risk that it fully appreciated, acknowledged and understood prior to its marketing efforts and even prior to its purchase of UCC. Only after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "*force majeure*" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "*force majeure*" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "*force majeure*", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

[k] After Harman shut down operations, Massey took a series of steps to prevent Plaintiffs, both corporately and personally, from pursuing legal remedies arising out of Massey's misconduct. Massey's CEO threatened the Plaintiffs not to undertake legal action. Massey offered to purchase the assets of Harman at a distressed sale price. Massey then delayed and ultimately collapsed the transaction in such a manner so as to increase the Plaintiffs' financial distress. Instead, utilizing confidential information obtained from Plaintiffs for the alleged purpose of negotiating a settlement of their disputes, Massey purchased a narrow band of coal reserves surround-

ing much of the Harman Mine for the purpose of making Harman unattractive to others and to decrease its value to all but Massey, and Massey planned to acquire Harman in the long run."

A. Actions Against Plaintiff Caperton Personally

The trial court identified, by way of example, specific actions which the jury could find were directed by Defendants against Plaintiff Caperton in his personal capacity, as follows:

> [i] Massey's conduct in "negotiating" directly with Caperton and under the February 9, 1998 letter agreement: Massey submitted a letter agreement to Mr. Caperton as President of Sovereign and Harman in which Massey and Wellmore expressly agreed to "pursue good faith negotiations toward concluding the described transactions." The transaction described in the agreement was intended to settle all issues relating to 1997 Coal Supply Agreement between the parties and permit Massey to acquire Caperton's interest in the Corporate Plaintiffs.
>
> [ii] Massey's conduct in negotiating a letter of intent with Grundy: In the letter of intent, Massey agreed to purchase the note held by Grundy. Massey entered into the letter of intent with Grundy with full knowledge of Caperton's personal guarantee on the Grundy note.
>
> [iii] Massey's conduct affecting Caperton's Terra obligations: Knowing Caperton's personal responsibilities for reclamation obligations to Terra, Massey agreed to replace the Terra reclamation bond with a Massey bond.

During negotiations, Massey internal documents reflect that Caperton's personal guarantees were discussed and, as a consideration for the transaction, the parties specifically negotiated the release of "his personal guarantee obligations." Recognizing Caperton's personal interest in the negotiations, Massey required Caperton to be a signatory to the closing documents, sought a far-reaching release from Caperton personally, and agreed to give Caperton a personal release in return.

[iv] Massey's duty to mitigate based upon knowledge of Caperton's actions taken in detrimental reliance: Massey knew through confidential information exchanged during the December 1997 and January 1998 discussions with Caperton, about Caperton's plans to shut down Harman as a result of Massey's wrongfully declaration of "*force majeure*". Massey further knew that, in reliance upon an agreement in principle reached concerning the key terms and a proposed closing date of January 31, 1998, Caperton intended to shut down Harman's operations on January 19, 1998. Massey was also aware of the impact Massey's failure to close as planned would have on Caperton personally (based on his personal guarantees, likely AVS violator listing, etc.). Unknown to Caperton, Massey made an internal decision *not* to close the transaction by the agreed-to date of January 31, 1998, but chose instead to let Caperton move forward with his plans based upon his mistaken belief concerning the closing date.

B. Additional Facts

In paragraph 6 of its order, the trial court took note of Massey's assertion that it had no "intent to interfere with Harman or to purposely cause financial distress for the Plaintiffs so that Massey would benefit in the long run. . . ." The lower court simply noted that "numerous pieces of documentary evidence authored by Massey belied that testimony. . . ."

In paragraphs 9 through 11 of the order, the lower court undertook a thorough review of the evidence supporting each of three causes of action upon which the case was tried and upon which the jury rendered its verdict: tortious interference, fraudulent misrepresentation and fraudulent concealment. The lower court identified the essential elements for each cause of action and analyzed the evidence adduced with respect to each such cause of action, finding a *prima facia* case established on each count.[2] In some

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[2] The three causes of action and their essential elements are identified in the order as follows:

> 1. Tortious interference with Plaintiffs' advantageous business relationships:
>
> (a) the existence of a contractual or business relationship or expectancy;
>
> (b) an intentional act of interference by a party outside that relationship or expectancy;
>
> (c) proof that the interference caused the harm sustained; and
>
> (d) damages.

See, e.g., Syllabus Point 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983);

> 2. The tort of fraudulent misrepresentation:

respects, the evidence supporting an element in one count was the same evidence supporting an element of another count, findings which we will endeavor not to repeat except where the context requires it. However, the facts the lower court found to be supported by the evidence paint in further detail a dastardly course of action by Defendants which will now go unredressed.

[Footnote continued from previous page]

> (a) that the act claimed to be fraudulent was the act of the defendant or induced by him;
>
> (b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and
>
> (c) that he was damaged because he relied on it.

See, e.g., Syllabus Point 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927).

> 3. Fraudulent concealment:
>
> (a) that the act claimed to be fraudulent was the act of the defendant or induced by him;
>
> (b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and
>
> (c) that he was damaged because he relied on it."

See, e.g., Syl. Pt. 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927). The trial court also noted that:

> A claim of fraudulent concealment "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998).

In paragraph 9, the trial court found *prima facia* proof that:

The evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation. As for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds (and resulting listing on the Applicant Violator System, or "AVS"), and his personal relationship with United Bank. Further, the evidence was clearly sufficient for the Jury to conclude that Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.

(a) For example, Massey tried to persuade LTV to buy its coals in place of Harman coal, used "*force majeure*" and other threats, and otherwise interfered with Harman's contractual relations for the purpose of placing the Plaintiffs, corporately and personally, in great financial distress in order to have Harman, not Massey, bear the cost of Massey's failed marketing strategy with LTV.

(b) For example, Massey directed Wellmore to declare "*force majeure*" as a result of Massey losing LTV's business due to Massey's failed marketing attempts.

(c) For example, after directing the declaration of "*force majeure*", the Defendants participated in set-

tlement negotiations with Plaintiffs and with Penn Virginia Coal Company, the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.

(d) For example, after directing the declaration of "*force majeure*", the Defendants dealt directly with Grundy National Bank pursuant to notes held by Grundy, for which Plaintiff Caperton had given his personal guaranty;

(e) For example, the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help to insure that Harman would only be valuable to the Defendants;

(f) For example, the Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses and caused Plaintiff Caperton's resultant AVS listing because, after conducting cost-benefit analyses, the Defendants concluded that it was in the Defendants' financial interest to do so[.]

In its order under discussion here, the trial court next commented on the evidence from which the jury might properly find that Defendants failed to establish their defense of "business justification" under section 767 of the *Restatement (Second) of Torts* and our case of *C.W. Development Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462, 465, 408 S.E.2d 41, 44 (1991), finding that the evidence was clearly sufficient for the jury to conclude that:

[i] Defendants developed a plan to interfere with Plaintiffs' existing and prospective relations with Wellmore before A.T. Massey Coal Company acquired Wellmore.

[ii] Massey acquired UCC with the purpose of gaining access to LTV and to have the ability to interfere with the supply of Harman to LTV.

[iii] The Defendants' Chief Executive Officer (CEO), without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation ("Wellmore") threaten Plaintiffs with the declaration of "force majeure;"

[iv] At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened the Corporate Plaintiffs and Mr. Caperton with long and protracted litigation in the event the Corporate Plaintiffs did not agree to give up the rights to their reserves;

[v] At the November, 1997 meeting the Defendants obtained confidential information and, thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;

[vi] Massey engaged in a cost-benefit analysis to determine whether it should direct Wellmore to declare "*force majeure*";

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommenda-

tions of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

[viii] After directing the declaration of "*force majeure*", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

[ix] The Defendants misrepresented their intention to settle any disputes between the parties through an offered purchase and sale of Harman assets, and instead delayed the transaction and then reneged on their stated intention to purchase the Harman assets by collapsing the deal after the Harman operations were shut down in anticipation of the sale;

[x] The defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and

[xi] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no

regard to the outcome of the Plaintiffs, either corporately or personally.

Returning to the evidence supporting the essential elements of the three counts, the trial court recited:

(k) That Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Office, Donald Blankenship, and not by Wellmore or any of its corporate officers;

(l) That Defendants, not Wellmore or any of its corporate officers, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing in the Bankruptcy Court and to have Caperton removed as the debtor-in-possession;

(m) That Defendants took numerous specific steps pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore.

The trial court further observed that any legitimate justification or privilege to interfere in the contractual relations of subsidiaries may be lost by wrongful conduct and further observed that the preceding recital established the evidence was sufficient to allow the jury to so conclude in this case, and then found further:

(p) That additional, substantial evidence of improper motive presented to the Jury included that, on August 1, 1997, one day after the acquisition of United Coal (the parent company of Wellmore), Wellmore's management recommended the purchase

of Harman's entire production for the following year, but that Defendants' CEO, Donald Blankenship, overruled this recommendation and directed Wellmore to refuse to purchase more than the minimum tonnages because of a purported "*force majeure*", that four days later, after having enacted Blankenship's directive, Blankenship put Wellmore up for sale in September of 1997[.]

In paragraph 10 of its order, the trial court found that: "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance." The order specifically noted eight examples of this sufficiency, five previously cited and the following three:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] In declaring "*force majeure*", Wellmore was directed by the Defendants' senior management to claim that the supposed event of "*force majeure*" was unforeseen, when Massey was well aware of and had in fact foreseen the event at least seven months before it occurred;
>
> [iii] In declaring "*force majeure*", Wellmore was directed by Defendants' senior management to claim that a coke facility had shut down, when Defendants knew it had not[.]

With respect to the tort of fraudulent concealment, the trial court concluded that: "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently concealed material information which they were under a duty to disclose, that Defendants were motivated to conceal material information and prevent the Plaintiffs, both personally and corporately, from discovering the information, and that Plaintiffs, both personally and corporately, were damaged because of Defendants' concealment." The lower court then gave thirteen examples, including these nine:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defe ants in place of Harman coal, the Defen nts concealed this fact from Plaintiffs;
>
> [iii] The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV;
>
> [iv] The Defendants purposely omitted to disclose the fact that it lost the LTV business, which it lost not because of any "*force majeure*" but because of Defendants' marketing strategy and dealings with LTV, particularly its insistence that LTV fill all of its coal requirements through Defendants' West Vir-

ginia operations via a sole supplier, long-term contract, and through its decision not to allow LTV to purchase Harman coal, LTV's preferred choice;

[v] Rather than tell Plaintiffs of its efforts to sell the Defendants' coals and its lack of effort in selling Harman coals, the Defendants' Representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed Wellmore to declare "*force majeure*" and effectively destroy the Plaintiffs' businesses.

* * *

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

* * *

[ix] The Defendants' declaration of "*force majeure*" was without any contractual basis as Defendants knew LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action, but instead was intended to place additional economic pressure upon the Plaintiffs, both corporately and personally;

* * *

> [xi] The Defendants concealed their true intention not to settle any disputed between the parties and reneged on its stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;

* * *

> [xiii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

The lower court also found "[t]hat there was sufficient evidence to support a finding of a duty by Defendants to disclose the information concealed from Plaintiffs, both corporately and personally, including, for example, the submission of a letter agreement dated February 9, 1998, to Caperton, in both his personal and corporate capacities, agreeing to 'pursue good faith negotiations toward concluding the described transactions', and that Defendants concealed their true intention at that time not to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants[.]"

Finally, the trial court reviewed the evidence supporting the award of damages for the three tort claims. Again, the evidence was in part related to the coal supply agreement, but in a much larger part was completely different from that admissible in a

contract action. After noting the proper measure of damages for each of the three torts, the trial court offered the following review of the substantial evidence, by way of example, from which the jury could reach its verdict on compensatory and punitive damages:

> [i] Corporate Plaintiffs introduced testimony through a number of witnesses and introduced evidence through a number of exhibits, including the expert testimony of Alan Stagg who opined to a reasonable degree of professional certainty regarding the business plan put into place when Caperton took over the business in 1993 and who provided a valuation of the Harman coal reserves, and of Mark Gleason who opined to a reasonable degree of accounting certainty that the Corporate Plaintiffs suffered damages exceeding $29 million as a result of the destruction of their business, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Corporate Plaintiffs' damages were caused by Defendants' tortious misconduct;
>
> [ii] That Plaintiff Caperton introduced evidence through testimony on his own behalf, through his expert Daniel Selby, who opined to a reasonable degree of accounting certainty, through the testimony of Bobby Reece, an executive at Grundy National Bank, and through the introduction of exhibits all establishing his individual injuries, including injury to his personal and professional reputation resulting in the loss of income, benefits and business opportunities, personal injury by way of lost earnings and employment op-

portunities by way of his listing on the AVS, and personal injury by way of Defendants' tortious interference with his personal guaranty obligations in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff Caperton's damages were caused by Defendants' tortious misconduct. Such evidence included, but was not limited to:

[iii] The Plaintiff Caperton was a business leader with whom his lenders and vendors were willing to do business before Defendants' tortious conduct;

[iv] The vendors and lenders with whom Plaintiff Caperton had previously done business now refuse to do business with him due to Defendants' tortious conduct;

[v] Due to the Defendants' tortious conduct, Plaintiff Caperton became a defendant in several lawsuits brought against him personally by the lenders and vendors with whom he had previously enjoyed a beneficial relationship;

[vi] Due to the Defendants' tortious conduct, Plaintiff Caperton has had judgments and tax liens entered against him personally throughout the State of West Virginia;

[vii] Due to the Defendants' tortious conduct, Plaintiff Caperton's personal credit rating and creditworthiness have been destroyed;

[viii] Due to the Defendant's tortious conduct, Plaintiff Caperton was and is precluded from obtaining a mining permit and engaging in his livelihood as a result of his AVS listing;

> [ix] The Plaintiff Caperton's AVS listing, according to testimony at trial by those in the mining industry, constitutes a "blackball";
>
> [x] Due to Defendants' tortious interference, Plaintiff Caperton's personal annual income went from in excess of $1.3 million to $60,000.00;
>
> [xi] The Defendants' invaded Plaintiff Caperton's personal privacy, including the unwarranted trespass on his personal real estate to photograph his personal residence, and due to Defendants' tortious conduct, Plaintiff Caperton has suffered mental anguish and sleepless nights.

Lastly, in paragraph 13 of its order, the lower court took note of the arguments regarding choice of law, and in its analysis noted the following:

Under either the principle of *lex loci delecti* (the law of the place where the tort occurred governs) or under the principle of "most significant relationship" test set forth in the *Restatement (Second) of Conflicts of Law*, West Virginia law should govern because: (1) the Defendants are all citizens or residents of, or have substantial contacts, with West Virginia; (2) the Corporate Plaintiffs are either citizens or residents of, or have substantial contacts with West Virginia; (3) the Plaintiff Caperton is a citizen of West Virginia; (4) much of the correspondence and documents submitted as evidence either was sent from, or sent into, West Virginia; (5) the November, 1997, meeting in which many of Defendants' threats and misrepresentations were made occurred in West Virginia. On this issue as well it should be noted that:

(a) That Defendants' misconduct occurred in substantial part in the State of West Virginia, was for

the purpose of benefiting Defendants' West Virginia operations, and substantially injured residents of the State of West Virginia;

(b) That, while the Coal Supply Agreement between Plaintiff Sovereign Coal Sales and Wellmore required Sovereign to pursue its breach of contact claims against Wellmore in the State of Virginia, the Defendant in that action (Wellmore) was a different entity than the Defendants here, that it was litigated and that jury awarded a verdict based upon a breach of contract only, and that the Virginia defendant's appeal was processed in the State of Virginia only;

(c) That, as the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the jury's satisfaction that the torts occurred in the State of West Virginia[.]

II. DISCUSSION OF THE APPLICABLE LAW

It is clear from the foregoing recital that Plaintiffs' claims in the West Virginia suit related to much more than just the coal supply agreement. Notwithstanding the fact that the improper declaration of *force majeure* gave rise to a legitimate contract action in Virginia directly related to the coal supply agreement, the entire course of dealings by Massey with Plaintiffs as revealed in the West Virginia action created additional causes of action in tort that properly could be pursued in a subsequent suit in West Virginia.

Nothing underlines this more than a fair consideration of the evidence introduced at trial of Massey's actions directed against Plaintiff Caperton in his individual capacity. He was never a party in his own right to the contract action in Virginia. The Massey actions against him personally reached far

beyond the enforcement of the coal supply agreement.

Similarly, it cannot be legitimately argued that the entire course of dealings by Massey with Plaintiffs that established tortious interference by Massey with the Harman companies and Plaintiff Caperton was related to the coal supply agreement or involved facts to be properly asserted and proved in connection with the Virginia contract action on the coal supply agreement.

Moreover, while Massey's involvement in the declaration of *force majeure* under the coal supply agreement is related substantially to the tort of fraudulent misrepresentation found by the jury, it is inaccurate to say that the evidence necessary to prove that tort was in all respects the same as that necessary to show a valid contract claim in the Virginia contract action.

It is likewise clear from the trial court's recital that the coal supply agreement and the Virginia contract action were only tangentially involved in proving the fraud case and that the evidence necessary to the proof of the fraud claim in tort was in very large part quite different from any evidence properly necessary to the contract claim.

With this startling and deeply disturbing evidence in mind, from which the West Virginia jury drew its conclusion that the Massey Defendants were liable for compensatory and punitive damages, we move on to a discussion of the reasons why the majority opinion in this case is just plain wrong and is a complete denial of justice.

A. Forum Selection Clause

The majority approached the forum selection clause issue in this appeal with the single-minded

purpose of nullifying the work of the Boone County Circuit Court. In so doing, the majority unnecessarily formulated the law of this state regarding forum selection clauses in a variety of ways. The new law was created to achieve the ultimate result desired in the case before us and by so doing falls short of advancing justice in this case and no doubt in others to come.

1. Standard of Review

At the outset, the majority furthered its cause by needlessly changing this state's law governing the standard of review applied to forum selection clauses. As related in the majority opinion, Appellants attempted to enforce the forum selection clause before the lower court by motion to dismiss based on venue. The majority correctly noted that this Court employs an abuse of discretion standard when reviewing motions to dismiss based on venue. Syl. Pt. 1, *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 624 S.E.2d 815 (2005). With the ink hardly dry on the 2005 opinion announcing this standard, the majority proclaims—without expressing any reason for trumping the rule of stare decisis—that "review of the applicability and enforceability of a forum selection clause is *de novo*." Syl. Pt. 2, *Caperton v. Massey*, --- W.Va. ----, --- S.E.2d ---- (No. 33350, filed April-, 2008). For some inexplicable reason, the majority has decided that the deference this Court normally affords lower court decisions regarding application of the law to the facts is suspended when the matter under consideration involves "applicability and enforceability of a forum selection clause." *Id.*

2. Prior West Virginia Law Governing Forum Selection Clauses

We are equally perplexed with the majority's position that this Court has generally approved forum selection clauses. While this Court in *General Electric Company v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), acknowledged *in a footnote*[3] that such clauses are not *per se* invalid, it was further recognized in that footnote that even though "our law on this point is skeletal, it does indicate that [forum selection] contract clauses which affect such matters as jurisdiction and the like should be carefully analyzed." *Id.* at 461-62 n.2, 275 S.E.2d at 292-93 n.2. While omitting this portion of the footnote from its quotation[4] the majority did include the paragraph noting:

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[3] The issue before the Court in *Keyser* was a choice of law clause rather than a forum selection clause.

[4] The entire test of footnote two in *Keyser* reads as follows:

> We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed.
>
> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W.Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W.Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller,*

As the Federal court observed, West Virginia appears not to subscribe to the rule that

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Inc., W.Va., 221 S.E.2d 882 (1975). Both *Axelrod* and *Miller* involved contracts which contained arbitration clauses. In *Axelrod*, we gave full faith and credit to a New York Court decision which confirmed an arbitration award made pursuant to the contract terms requiring arbitration. In *Miller*, we held valid a contract provision which made arbitration a condition precedent to suit in the West Virginia courts. The writer of the *Miller* opinion noted that the common law rule preventing parties from ousting the court of jurisdiction by their agreement was "archaic". 221 S.E.2d at 885.

As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. 'Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just'. *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D. W. Va.1976). *See also, Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D. W. Va. 1980).

The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems. *Leasewell, supra* at 1014. Choice of law clauses, however, are not automatically void either, as they too are sanctioned in commercial transactions by the West Virginia Code. W. Va. Code 46-1-105(1). Thus it appears that we should not per se invalidate a choice of law clause without analysis anymore than we should invalidate a choice of forum clause without careful scrutiny.

> choice of forum clauses are void per se. 'Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just'. *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D. W. Va. 1976). *See also, Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D. W. Va. 1980).

See Slip Op. at 16. By selectively quoting from *Keyser*, the majority reaches the sweeping conclusion that the law of this state favors enforcing forum selection clauses. An objective reading of the entire footnote hardly supports such a conclusion. Moreover, there are no subsequent cases in our jurisprudence suggesting a move in that direction in this area of our law. The extensions of forum selection clause law in this case to cover and govern the tort claims brought in the West Virginia suit before us ignores the very spirit of a "reasonable and just" outcome contemplated by the Court in *Keyser*.

The majority likewise ignores the express caution in *Keyser* that forum selection clauses affecting "jurisdiction and the like"—e.g., venue—should be "carefully analyzed." 166 W.Va. at 461 n. 2, 275 S.E.2d at 292 n.2. As a result of the majority's reliance on selective portions of a footnote, Mr. Caperton's individual right to due process and a fair and just determination of his claims has been foreclosed.[5]

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[5] The parties named in the Virginia case were Harman Mining Corporation, Sovereign Coal Sales, Inc. and Wellmore Coal Corporation. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002).

Mr. Caperton as an individual was not a party to the coal supply agreement (hereinafter also referred to as "CSA") and did not have standing in his individual capacity to enforce the CSA. The majority has left him without remedy or a place where one could be sought.

The long and the short of it is that the majority simply pushed right past the cautious and judicious language of *Keyser* to construct and apply sweeping new law clearly fashioned to unequivocally deprive Plaintiffs, both corporate and individual, of the relief to which they are entitled.

3. Scope of New Law Governing Forum Selection Clauses

Not only did the majority institute new law regarding forum selection clauses on doubtful precedent, it also applied the new law by consistently turning a blind eye toward the actual facts of this case. The majority continuously repeats its assertion that the forum selection clause in the 1997 CSA is the basis for the conflicts giving rise to this lawsuit,[6]

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[6] Specific supporting examples found in the majority opinion include: "[T]he circuit court erred in denying a motion to dismiss . . . based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit." Slip Op. at 1; "All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore's declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA." *Id.* at 32; "With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants."

yet the majority fails to explain how Massey's conduct, conduct subsequent to Wellmore's declaration of *force majeure*, is related to the CSA.[7] Moreover, the trial court specifically found that Massey's actions were not connected with the 1997 CSA, a factual finding that is entitled to deference by this Court. As determined by the trial court, some of Massey's unsavory conduct was performed prior to Massey's acquisition of United, Wellmore's parent company. It was also proven that even more of Massey's unsavory conduct was performed after Massey had sold Wellmore. Despite these proven facts, the majority says that all of Massey's conduct is somehow related to the CSA. The majority improperly substitutes its own judgment without acknowledging the relevant findings of the lower court or declaring the findings of the trial court to be clearly erroneous. The majority says that "[i]n the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey."

[Footnote continued from previous page]

Id. at 33; "In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey." *Id.*; "[B]ecause none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore's declaration of *force majeure* under the 1997 CSA, these claims are all brought in connection with the 1997 CSA and, as a consequence, are within the scope of the forum selection clause contained therein." *Id.* at 34.

[7] The majority also says that all damages incurred by the Plaintiffs resulted from Wellmore's declaration of *force majeure*.

Caperton, --- W.Va. at ----, --- S.E.2d at ----, Slip Op. at 33. Not only is this argument circular-that is, in the absence of Massey's deceitful plan, Wellmore would have never declared *force majeure* and the Harman companies would not have been impeded by Massey-but it also does not reconcile with the facts of the case. Summarizing the findings of the circuit court, the majority noted that subsequent to Wellmore's declaration of *force majeure*, Massey continued in negotiations with the Harman companies and Mr. Caperton for Massey's purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, "ultimately collapsed the transaction in such a manner so as to increase [the Harman companies'] financial distress." In addition, Massey utilized the confidential information it had obtained from the Harman companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine, in order to make the Harman Mine unattractive to others and thereby decrease its value. During the negotiations for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Harman companies' obligations. **Subsequently**, *the Harman companies filed for bankruptcy*.

The majority provides no explanation whatsoever as to how these acts committed by Massey are related to Wellmore's declaration of *force majeure*, and the failure to do so is because they bear no relationship to Wellmore's declaration of *force majeure*. Using the majority's line of reasoning, had Massey not entered into "sham" negotiations with the Harman companies and Mr. Caperton for Massey's purchase of the Harman Mine, the Harman companies may

not have been forced into bankruptcy. Or had Massey not purposefully collapsed the transaction, after multiple delays, the Harman companies may not have been forced into bankruptcy. Or had Massey not improperly used Mr. Caperton and the Harman companies' confidential information for Massey's personal benefit, the Harman companies may not have been forced into bankruptcy.

To say that Massey's deceitful conduct "flowed from" Wellmore's declaration of *force majeure* is utterly unjustifiable. Wellmore's declaration may have made the Harman companies more vulnerable to this attack by Massey. However, it was Massey's *subsequent actions* that were the **proximate cause** of the Harman companies destruction.

With respect to the Harman companies' claim of tortious interference with existing business relationships, the majority says

> "Count I" of the amended complaint alleges tortious interference with existing contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations.

Caperton, --- W.Va. at ----, --- S.E.2d at ----, Slip Op. at 32-33.

Contrary to this assertion by the majority, the trial court specifically found that it was Massey's conduct subsequent to the *force majeure* declaration that affected the lease of the Harman Coal reserves and the labor contract. Had Massey not engaged in its deceptive conduct-pretending to carry on purchase negotiations in order to gain confidential information for use against the Harman companies and Mr. Caperton-who knows what the outcome may have been. Not surprisingly, that was the question presented to the Boone County jury: had Massey not engaged its deceptive actions, what position would Mr. Caperton and the Harman companies have been in? Stated another way, what injuries did Massey inflict on Mr. Caperton and the Harman companies by engaging in its deceptive actions?

Although unsupported by the evidence, the majority sweepingly states that "insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful." *Caperton*, --- W.Va. at ----, --- S.E.2d at ----, Slip Op. at 34 n.24. The majority inaccurately indicates that a wrongful declaration of *force majeure* is necessary to the claims presented in this case. According to the majority, had Wellmore rightfully declared *force majeure*, the Harman companies and Mr. Caperton would not have a claim against Massey. The majority's new formulation of the law now permits companies to enter into "sham" negotiations and thereby acquire confidential information, only to use that information to drive their competitors out of business.

4. Due Process

The manner in which the majority applied its newly announced four-part test for determining whether a forum selection clause should be enforced violates the due process rights of not only Mr. Caperton, but the corporate appellees as well. As the majority points out by reference to multiple pages of authority, retroactive application by courts of a newly announced law is not a *per se* violation of due process. However, when a new burden is placed on a party as part of that new law and the party charged with carrying the burden is not permitted an opportunity to go forward with evidence to meet the burden, procedural due process guarantees are violated. "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); *see also Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 101 (1993). There is absolutely no way that the corporate appellees or Mr. Caperton could have heretofore attempted to meet the burden the new standard imposes in order to overcome the presumption of enforceability. The majority affords no opportunity after announcing the new standard for the affected parties to meet the newly established burden. Obviously, Appellees' rights to due process have been abridged.

5. Contractual Rights of Third-parties

To attain its objective in this case, the majority has also ignored one of the most basic principles of contract law, that being "the primary purpose and function of the court in interpreting a contract is to ascertain the parties' intention so as to give effect to

that intention." 11 *Williston on Contracts* § 32:2 at 397 (4th ed. 1999); *see also Restatement (Second) of Contracts* § 201. Courts are obligated to interpret and give effect to the mutual intention of the parties at the time of contracting. Parties to a contract may create rights in third parties by manifesting an intention to do so within the contract or by the circumstances surrounding the making of the contract." However, in order to be entitled to relief as a third-party beneficiary, the protection afforded must have been in the contemplation of the parties at the time of the execution of the contract." 17B C.J.S. *Contracts* § 621 (1999); *see also* W. Va. Code § 55-8-12 (1923) (Repl. Vol. 2000). It is inconceivable that any of the parties to the CSA could have or should have foreseen or expected at the time of contracting that Massey would unlawfully undertake to do irreversible harm to the Harman mining operation, and to Mr. Caperton as an individual, since he was not a party to the contract in his individual capacity. Even though the contract played a role in different facets of the case brought in West Virginia, Appellees' tort claims against Massey embraced more than the obligations and duties arising out of the CSA or conduct undertaken pursuant to the CSA.

In syllabus point eleven, the majority announces a new rule, that "[a] defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract." In the first case cited by the majority in support of this rule, *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, (5th Cir. 2006), the reviewing court enforced a forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted from *performance*

of the contract. The same cannot be said for the instant case where Massey benefitted from the *destruction* of the 1997 CSA.

The trial court found that Harman Development and Wellmore had formed a strong coal supply relationship with LTV Steel—a relationship that Massey desperately wanted, and apparently would stop at nothing to get. Massey developed and executed a very risky plan to obtain LTV's business,[8] and when that plan failed, Massey refused to accept responsibility for it actions. Massey admits that it did a "cost-benefit" analysis and determined that it was in its best interest to declare *force majeure*. However, it does not seem the declaration was in Wellmore's best interest, as the trial court found that Wellmore sold and shipped nearly two-thirds of the coal purchased from the Harman companies to LTV Steel. The majority's casting of the Wellmore-Massey relationship as being closely connected in interest is simply not correct according to the facts. Even though Massey owned Wellmore for a brief period of time-less than eight months-Massey did not further the interests of

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[8] After years of trying, unsuccessfully, to obtain LTV Steel's business, and knowing that Wellmore was one of LTV Steel's primary customers for its Pittsburgh plant, Massey decided to acquire Wellmore. Massey purchased Wellmore on July 31, 1997, despite LTV's July 19, 2007, announcement that it intended to close the Pittsburgh coke plant for EPA reasons. Massey's internal memos introduced at trial in West Virginia clearly showed that Massey realized that in doing this, there was a high risk that LTV Steel would simply end the relationship with Wellmore, which happened. In its final order, the circuit court found that "[o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare '*force majeure*' against Harman. . . ."

Wellmore by destroying Wellmore's relationship with LTV Steel and then with the Harman companies.

The majority emphasizes that Mr. Caperton or the Harman companies could reasonably foresee that they would be bound by the forum selection clause. However, could Mr. Caperton or the Harman companies reasonably foresee that Massey would acquire Wellmore's parent company of United Coal for a brief eight-month period, by which Massey would be able to enforce the forum selection clause? Could Mr. Caperton or the Harman companies reasonably foresee the actions Massey took after it had sold Wellmore-which removed any type of contractual relationship whatsoever between the parties-would still fall within the forum selection clause in the 1997 CSA? Apparently the majority believes Mr. Caperton and the Harman companies should have anticipated all of the peculiarities arising in this case. Ultimately, by placing such unrealistic requirements as to foreseeability on contracting parties, the majority makes West Virginia a truly vulnerable place to do business.

Another basic tenet of contract law is that the parties approach the contracting process act with good faith and the intent to deal fairly. As summarized by one authority,

> there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . .
>
> The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.

17A Am.Jur.2d *Contracts* § 370. Initially, Harman had included in its Virginia suit a claim sounding in contract for breach of the duty of good faith and fair dealing,[9] but withdrew the claim before the trial in that case. Withdrawal of the claim is fully understandable because only Wellmore, as a party to the CSA, could be bound by the *contractual* duty of good faith and fair dealing. As the lower court herein concluded from the evidence before it, manipulation of the CSA and its forum selection clause was just one of many tools Massey used both before, during and after its ownership of Wellmore. The aim of Massey's plan was either to directly cause the demise of the Harman corporations and the financial ruin of Mr. Caperton as an individual, or at least use the Harman coal operation and Mr. Caperton as pawns to force United to accept the lower grade Massey coal for the premium coal produced from the Harman mine. There was no indication that Wellmore was aware of Massey's plan to eliminate the Harman mining operation or could have foreseen the implementation of such a plan when it entered and renewed the CSA with the corporate appellees. Essentially, the majority, by extending the right to enforce a forum selection clause under the circumstances of this case to Massey as a non-signatory to the CSA, has created a loophole whereby a non-party to a contract may gain the benefit of enforcing a forum selection clause without having the burden of accountability for acting in good faith and dealing fairly. Massey and others like Massey can simply ride the

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[9] The majority mis-characterized this claim as a tort claim, but the corporate appellees made it clear during oral argument that no claims sounding in tort were filed in Virginia.

coattails of good business citizens in order to accomplish covert, questionable and reprehensible acts. We hardly find this conducive to promoting trust in the contracting process or otherwise furthering commerce and business interests-nor does it foster trust in the judicial process.

6. Weaknesses of the Announced Forum Selection Clause Test

Even if one acknowledges the suitability-in the abstract-of the test made applicable to forum selection clauses by the majority opinion, two very serious problems are readily apparent with the application to the case sub judice of the new test announced by the majority in syllabus point six. First, as mentioned earlier, retroactive application of this test does not allow parties the opportunity to overcome the newfound presumption of enforceability, thereby depriving the parties opposing enforcement of the clause their due process rights. Our second concern rests with the new test not giving trial courts, charged with weighing the evidence regarding forum selection clause issues, the freedom to decide that the presumption of enforceability has been rebutted purely on the circumstances as revealed in the record before them. This flexibility, placed in the hands of our capable trial court judges, would serve to eliminate unnecessary expenditure of time and resources in appropriate cases.

We fear that the readily apparent flaws in the new standards embraced by the majority as governing enforcement of forum selection clauses in this state represent only the tip of the iceberg of problems which will surface upon pragmatic application of the standards in the courtrooms of this state. All lawyers know that the law can be read and written to

accommodate the needs of a situation, and that the law has to be malleable in order to address a variety of ever-evolving circumstances. Consequently, good, enduring and meaningful law must be written in such a manner as to promote the noble cause of the larger good and not merely support the agenda of a few. Unfortunately, the new law governing forum selection clause issues which the majority has designed in this case reaches unreasonable and unjust results not only for the affected parties, but also for the judge and jury who heard this case and all businesses and individuals who will be impacted by anticipated as well as unexpected results.

B. Res Judicata

Dismissal on res judicata grounds was unnecessary and again exemplifies the majority's results-driven approach to this appeal.

Because the law of Virginia controls the application of res judicata in this case, a close examination of the decisions of the Supreme Court of Virginia *governing the relevant time period*[10] is essential. This study, however, must be undertaken with the understanding that the pertinent cases were decided at a time when common law and equity pleading were not merged in Virginia.[11] Such recognition is

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10 The relevant time period would logically be when the tort claim could have been joined with the contract claim filed in Virginia. Thus the relevant period would be May 21, 1998, when the contract case was filed, until no later than when the final judgment order in Virginia was entered on May 7, 2001.

11 Common law and equity procedure were not merged in Virginia until January 1, 2006. *See* W. Hamilton Bryson, *The Merger of Common-law and Equity Pleading in Virginia*, 41 U. Rich. L. Rev. 77 (2006).

necessary because the separation of law and equity often affected whether one or more of the four elements necessary to invoke application of the doctrine of res judicata[12] was present under the facts of a given case. For example, some remedies were only available in actions brought in the chancery side of the courts while others were only obtainable on the law side of the courts.[13] Moreover, the discussion in the cases does not always address the law-equity distinction when examining the presence or absence of the elements substantiating application of res judicata, and sometimes reasoning based on the distinction is applied in cases where the basis of the two suits is not split between common law and equity. As a result, the status of the applicable law involving res judicata in Virginia simply was not as clear as the majority opinion leads one to believe. This is particularly true in Virginia's Supreme Court cases involving the meaning of the element of "identity of cause of action." A review of these cases, all decided no later than the time that the final judgment was entered in the Virginia suit, does not support the majority's conclusion that Virginia would have applied the transactional approach to the res judicata cause of action element. Instead, such review discloses

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12 The elements necessary to justify application of the doctrine of res judicata in Virginia are: "(1) identity of remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 349 S.E.2d 125, 128 (Va. 1986); *Mowry v. City of Virginia Beach*, 93 S.E.2d 323 (1956).

13 This is not to say as the majority suggests that the law/equity distinction is the only factor considered in Virginia to determine whether the same remedy is available for res judicata purposes.

that this area of Virginia's jurisprudence was in a state of flux at the time the final judgment order was entered against Wellmore in the breach of contract suit brought in Virginia.

More than one test has been employed over the years in Virginia to determine whether the element of "identity of cause of action" has been satisfied. One approach most commonly applied involves an analysis of the evidence. The extended vitality of this approach was attested to in the 1988 case of *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1988), in which it was stated that for res judicata purposes,

> [t]he principal test to determine whether claims are a part of the same cause of action is whether the same evidence will support both claims. *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987)[("The test to determine whether claims are part of a single cause of action is whether same evidence is necessary to prove each claim.")]; *Jones [v. Morris Plan Bank]*, 168 Va. [284] at 290-91, 191 SE [608] at 609-610 [(1937) [("One of the principal tests in determining whether a demand is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of facts necessary to maintain the action. If the same evidence will support both actions, there is but one cause of action.")]; *see also Wright v. Castles*, 232 Va. 218, 223-24, 349 S.E.2d 125, 129 (1986) [(relying on *Jones v. Morris Plan Bank* to apply the same evidence test)]; *Bates [v. Devers]*, 214 Va. [667] at 672, 202 S.E.2d [917] at 922 [(1974) (applying same evidence test)].

Saunders at 495-96. Some additional older cases in which the "same evidence test" was employed to determine whether claims were part of a single cause of action are *Kelly v. Board of Public Works*, 25 Gratt. 755, 763, 1875 WL 5640, *4 (Va. 1875) ("The two claims . . . are distinct divisible claims, depending on separate contracts, made at different times and upon different principles; and the evidence to support one is not necessary to support the other, but much of it that would be material to sustain the one would be irrelevant to the other."), *Cohen v. Power*, 32 S.E.2d 64, 65 (Va. 1944) ("The test generally applied in the application of the doctrine of res adjudicata is to determine whether the facts essential to the maintenance of the two actions are the same. If the same facts or evidence would sustain both actions . . . subsequent action based upon the same facts [is barred]."), and *Feldman v. Rucker*, 109 S.E.2d. 379, 384 (Va. 1959) (second suit found to be a different cause of action because its outcome "was dependent upon different proof and principles of law.") Since the same evidence test did not always serve justice, other factors were also considered by the high court of Virginia when deciding the presence or absence of similarity between causes of action. In *Smith v. Ware*, 421 S.E.2d 444 (Va. 1992), the Virginia Supreme Court found that different causes of action existed because different rights were asserted in each suit, one based in equity and the other based in law. In another case in which one suit was filed in the chancery court and the other was filed in the law court, the examination of the cause of action element turned on whether the *purposes and issues* in both suits were the same. *Worrie v. Boze*, 95 S.E.2d 192, 197 (1956). Yet another approach used in Virginia to vary the result achieved by strict application of the

same evidence rule was to look at the transaction from which the suits arose.

It was in the 1974 case of *Bates v. Devers*-a case earlier noted as applying the same evidence test-that the Virginia Supreme Court first referred in a footnote to the term "transaction" in relation to the res judicata element of cause of action. The footnote from *Bates* was elevated to the body of the discussion in *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903 (Va. 1986), in the following manner:

> For the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen of a definable factual transaction.' *Bates v. Devers*, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 921 n.8 (1974).

Allstar at 905-06. Since the same evidence test was thereafter touted in the 1988 case of *Saunders* as the principal test in this regard, a fair reading of *Allstar* is that the result the high court of Virginia believed would serve justice could not be attained by strict application of the same evidence test. Although the two suits which were the subject of the res judicata inquiry in *Allstar* would have relied upon the same evidence, the spin the Virginia Supreme Court placed on the same evidence test in *Allstar* allowed the high court to reach the conclusion that the second suit should proceed because some of the relevant events had not occurred until after the first suit was decided. The *Allstar* court did not approach the matter before it using the transactional analysis method in order to find that the facts supported an inseparable amalgam constituting but one cause of action. Rather, the Court in *Allstar* relied upon the term "definable factual transactions" to separate the in-

terrelated facts before it and find two identifiable causes of action. *Id.* Furthermore, there was no indication in the body of the *Allstar* opinion that prior decisions were overruled, superseded or should be read in light of the adoption of a new standard for determinations of causes of action for res judicata purposes. Thus the principal insight *Allstar* provides is that the Supreme Court of Virginia would not strictly adhere to a test for cause of action which would serve to eliminate a party's right to a full and fair hearing on matters which had not previously been adjudicated.

Although decided outside of the relevant time period of the case sub judice, the later case of *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504 (Va. 2003), supports this reading of *Allstar* while serving as further testament that the law in this area remained unsettled in Virginia until the Supreme Court of Virginia adopted Rule 1:6 of the Rules of the Supreme Court of Virginia in 2006. The majority and dissenting opinions filed in the *Davis* case nicely summarize the differing viewpoints on the proper test to apply in this regard.

The majority simply ignores the unsettled status of this area of law in Virginia in 2001 when the Virginia suit was concluded and instead looks to what the Virginia Supreme Court eventually did to resolve the dilemma. It also ignores the Virginia high court's overarching concern with achieving justice when faced with a decision of what constituted an identity of cause of action for res judicata purposes. The only Virginia cases within the relevant time period upon which the majority squarely relies are *Allstar* and the unpublished *circuit court* case of *Cherokee Corporation v. Richardson*, 1996 WL 1065553 (Va. Cir. Ct. 1996). This reliance could have only

been used to substantiate the Virginia Supreme Court's later adoption in 2006 of a transactional analysis rule.[14] It is noteworthy for due process purposes that the Supreme Court of Virginia prospectively applied the new rule only to those cases brought on or after the effective date of July 1, 2006. To say that the parties knew, should have or even could have known that the high court of Virginia would-some five years after the final judgment was entered in the Virginia contract case-adopt a transactional analysis approach as the sole means to define cause of action for res judicata purposes is to assume that the parties had access to a crystal ball or possessed prescient abilities.

Significantly, the majority could not have followed the precedential law of Virginia and applied the same evidence test in any form since the entire record of the Virginia proceeding was not admitted into the record of this appeal, making a comparison of evidence between the Virginia suit and the West Virginia suit impossible. This serves to further demonstrate the majority's dogged pursuit of a course which would produce the results it desired in whatever available manner.

Even if the transactional analysis test was the controlling law of Virginia in 2001, the matters raised in the West Virginia suit went beyond what the majority found to be central to the transaction: the CSA.[15] The evidence introduced in the Boone

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14 *See* Rule 1:6, Rules of Supreme Court of Virginia, regarding res judicata claim preclusion and therein defining "cause of action" for res judicata purposes.

15 The coal supply agreement was part of the record in this appeal.

County suit proved that Massey developed its plans to undermine the Harman Mine operations and to place Mr. Caperton's individual interests in jeopardy before the first CSA was signed, that is before Massey had any ownership interest in Wellmore, and carried that effort forward long after Massey sold Wellmore. Furthermore, the purposes of the transactional analysis approach have been frustrated by the way that the majority undertook to apply it in the instant case. It is recognized in the federal courts which have adopted the transactional analysis test that "[n]o simple test exists to determine whether causes of action are identical for claim preclusion purposes, and each case must be determined separately within the conceptual framework of the doctrine." *Pittston Co. v.. U.S.*, 199 F.3d 694, 704 (4th Cir. 1999); *see also* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, 18 Fed. Prac. & Proc. Juris.2d § 4407 nn. 53-54 (2002) (citing cases finding either no definition possible or no definition desirable). It is further recognized that the utility of the transactional analysis test is that it affords flexibility in examining cases which are more complex, and has been used to justify separating claims in such circumstances even though the claims arise from a common background. As summarized by one authority commenting on how the federal courts have applied the transactional analysis test in complex cases:

> One of the most general reasons for separating claims is that a broad course of completed unlawful conduct has included a clearly separable event that gave rise to distinctive injury. Thus the victim of a long conspiracy to destroy a business was permitted to follow an action for libel with an antitrust action in

> which the libel was merely one piece of evidence to prove the overall conspiracy. In like fashion, a trustee in bankruptcy was permitted both to recover a judgment against the controlling stockholder for breach of fiduciary responsibilities in a specific transaction, and later to subordinate the stockholder's rights to the rights of other stockholders on the basis of continuing breach of its responsibilities throughout the entire period of ownership. Despite the relationship among the facts of these separate actions in origin and motivation, these decisions seem to respond well to pragmatic considerations of trial efficiency and do not pose any substantial threat to interests of repose.

Wright, Miller, Cooper, 18 Fed. Prac. & Proc. Juris.2d § 4408, 195-196 (footnotes omitted).

The majority failed to closely examine whether there were clearly separable events and distinctive injuries arising in the instant case, and did not consider the pragmatic implications of joining all claims into one trial. Regrettably, it appears the majority was more committed to the aim of reaching a desired conclusion rather than arriving at a just result-which the transactional analysis approach would clearly support under the facts presented in this case.

III. SUMMATION

Although the majority opinion made substantial additions to the opinion vacated as a result of granting the rehearing motion, the omissions from the original decision overshadow the additions. Specifically, despite the disagreements among the individual Justices in the vacated opinion, all five did agree on one point:

> **[A]t the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case.**

Caperton v. A.T. Massey Coal Co., Inc., 2007 WL 4150960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

As amply demonstrated by the preceding analysis, the majority could have readily allowed the work of the Boone County Circuit Court to stand. Instead, the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions. In pursuit of its desired outcome, the majority did not apply the controlling law of Virginia and instead rigidly applied a test unknown to the parties at the time the litigation was pending in Virginia, and did so without regard to the inherent flexibility of the rule. The new test was applied in such a way as to ignore the complexities of the transaction and with gross disregard for the due process rights of the litigants. Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.[16]

---

[16] Mr. Caperton raised a further issue regarding possible disqualification of Justice Benjamin. The majority did not address this issue, likely because it is the practice of this Court, as it is the practice of the United States Supreme Court and other federal courts, to leave decisions on disqualification motions for each judge to decide individually. Unfortunately, with true regret, we are unable to stand silent in the present circumstances. Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*,

While it gives us no pleasure to write this dissent, we recognize a duty to do so in the name of justice. Indeed, embodied in our constitution is the clear statement that "[f]ree government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles." W. Va. Const. Art. 3, § 20. Regrettably, the majority has radically strayed from the fundamental principles of fairness and justice in maintaining its course of setting aside the Boone County decision in this case, a course to which we wholeheartedly and fervently dissent.

[Footnote continued from previous page]

349 U.S. 133, 136 (1955), it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts. On the record before us, we cannot say with certainty that those cases have application here. It is now clear, especially from the last motion for disqualification filed in this case, that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed.

APPENDIX B

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice

Date: April 7, 2006

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.; Docket No. 060936*

Pending: Underlying Plaintiffs' Motion to Disqualify Justice Brent D. Benjamin

---

Pending are motions by plaintiffs below ["movants"] in this case currently pending in the Circuit Court of Boone County, Civil Action No. 98-C-192, seeking my disqualification, or recusal, in matters related to this case. No response has been received from any of the defendants below. With an issue for determination now before this Court, the said motions are now ripe for consideration.

Recusal motions serve an important role in the administration of justice. Each consideration of disqualification must be determined by the specific facts present in the case, and not by generalized subjective preconceptions, conclusions or speculations. A consideration thus necessarily must focus on objective bases specific to a given case and a given jurist, *i.e.*, whether there is a proper basis based on objective factors to believe that a given jurist will be unable to render a fair and impartial decision in a given case.

I have therefore carefully considered the bases and accompanying exhibits proffered by the movants.

Despite the amount of materials filed, little if any relates to this Justice and no objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case. What is amply present in the materials filed is surmise, conjecture and political rhetoric.[1]

Consideration of a motion seeking disqualification should not be undertaken lightly. As well-stated by Judge John Sirica, "(t)here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), at FN 360.[2] The proper purpose of such a motion is to preserve, not inhibit, the administration of justice.

---

[1] Movants include within their exhibits campaign finance reports apparently filed by this Justice's campaign committee. Such exhibits were not reviewed by this Justice as such would be inappropriate.

[2] In the *Haldeman* case, the District of Columbia Circuit Court of Appeals wisely observed in dicta that, "(i)n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision." *Id.* Recusal motions serve an important role in the administration of justice. However, when such motions are instead interposed by litigants in an attempt to predetermine the outcome of cases in their favor or to further subjective stereotypical preconceptions about a judge or justice, such motions may be condemned as an assault upon the administration of justice.

The measure of whether a Justice should or should not recuse himself necessarily is not the bias or prejudice which a litigant may have regarding the Justice. Our judicial system requires more. A litigant's subjective belief that a Justice may be more or less favorable to his position is therefore an insufficient basis for disqualification.

The instant motions are denied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of April 2006, the following order was made and entered:

Hugh M. Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales, Inc.,
Plaintiffs Below, Petitioner

vs.) No. 05-167

A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc., Defendants Below, Respondents

This day came the Honorable Brent D. Benjamin, Justice of the Supreme of Appeals of West Virginia, and notified the Clerk of this Court of his refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX C

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice /s/

Date: January 18, 2008

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.; Docket No. 33350*

Pending: Motion of Disqualification of Justice Brent D. Benjamin filed by Appellees Harman Development Corporation, *et al.* on January 17, 2008

Pending is a renewal of a motion seeking my disqualification in this case filed by appellees, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. [collectively referred to herein as "movants"]. This case is currently pending before this Court on motions by appellees for a rehearing related to this Court's November 21, 2007 decision which reversed the lower court decision (with Justices Starcher and Albright dissenting and myself concurring).

A review of the instant motion reveals the motion to essentially be identical to an earlier motion filed by movants in which I issued a memorandum on April 7, 2006 denying the prior motion, finding:

> Despite the amount of materials filed, little if any relates to this Justice and no *objective* information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case. What is amply present in the materials is surmise, conjecture and political rhetoric. [Footnote omitted.]

[Emphasis added.] It is observed that movants present no new information, objective or otherwise, to support their contentions. It is furthermore noted that this motion was not filed until after the decision contrary to the positions of movants in this matter was rendered and after the undersigned filed his concurring opinion to that majority opinion. Finally, it is noted that the motion contains no specific legal precedent for the position advanced by movants.

The motion seeking disqualification comes over three years after the 2004 election and focuses entirely on that election. It contains nothing about this Justice's record on the Court. There are no allegations that this Justice has or has had any relationship with Mr. Blankenship or any party in this litigation, or that he ever represented Mr. Blankenship or any Massey company in his twenty-plus years of private practice. Nor is this Justice aware of any basis by which this Justice should disqualify himself.

It is noted that in over three years of service on this Court involving a number of decisions involving the interests of Massey Coal and/or its subsidiaries, no other litigants have sought this Justice's disqualification, including the Office of the Attorney General

of West Virginia, Darrell V. McGraw, Jr. Furthermore, it is also observed that, according to a November 3, 2005 article by Ken Ward, Jr., in *The Charleston Gazette*, state environmental regulators saw "no grounds" to ask this Justice to be disqualified. According to the article, Perry McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, related that DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking this Justice's disqualification in a matter involving Massey. According to McDaniel, "There are clearly no grounds here for us to ask a Supreme Court justice elected by the people to step down in this matter."

Disqualification of a publically-elected judge is appropriate only when the motion is supported by a factual basis, and when the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality. As demonstrated in the preceding paragraph, the instant motion fails this test. Indeed, the need for a proper factual basis to support a motion for disqualification is necessary to ensure that popularly-elected judges are not subject to media-driven attacks from which they cannot defend themselves, from campaigns to generate a veto power over judges by the creation and maintenance of public controversy in media outlets, and from attempts to engage in "judge-shopping"—a practice universally condemned. A review of my earlier memorandum demonstrates that movants then, as now, fail to advance any objective evidence which may serve as a proper basis for this Justice's disqualification in this matter.

Simple conclusory accusations and assumptions are plainly insufficient to support a motion for disqualification. To interpret the term "impartiality

might reasonably be questioned" in such a subjective and partisan manner as the movants seem to suggest, particularly after this Justice voted in the Majority against their legal positions in this case, would create a system where there would be almost no limit to recusal motions and popularly-elected courts of this State would be open to "judge-shopping" under the guise of litigation strategy.

As referenced in my earlier decision, the District of Columbia Circuit Court of Appeals wisely observed, in dicta, that, "[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision" is appropriate to this motion. *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) at FN 360. In that case, involving matters related to the Nixon Administration, attorneys sought the disqualification of Judge John Sirica. Lacking a proper factual basis for such an attempt, they failed. Therefore, a litigant's subjective belief, without more, that a Justice may be more or less favorable to his position is an insufficient basis for disqualification.

The instant motion is denied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of January 2008, the following order was made and entered:

A. T. Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants

vs.) No. 33350

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX D

FILE COPY

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice /s/

Date: April 3, 2008

Case: *A.T. Massey Coal Company, Inc., et al. v. Hugh M. Caperton, et al.; Appeal No. 33350*

Pending: Second Renewed Joint Motion for Disqualification of Justice Benjamin

---

Considered is the Second Renewed Joint Motion for Disqualification of Justice Benjamin, filed on March 28, 2008, by counsel of record for Appellee Hugh M. Caperton and by counsel of record for Corporate Appellees in this case. The joint motion proffers information purportedly developed by the parties between March 24 and March 27, 2008.

It is noted that this filing comes nearly four years after the 2004 race in which this Justice was elected by the people of West Virginia; comes over seventeen months after the filing of this appeal with this Court on October 24, 2006; comes over four months after the initial decision of this Court on November 21, 2007, in which this Justice voted with the majority of the Court against the interests of the joint appellees; comes over a month after supplemental briefs were filed and considered on the reconsid-

eration of this appeal; comes over two weeks after oral arguments were heard on the reconsideration of this appeal; and comes over two weeks after this Court's Decision Conference on this appeal's reconsideration.

It is further observed that this joint motion has been filed during the pendency of a 2008 political race in which two seats on the West Virginia Supreme Court of Appeals are to be elected; that the said survey specifically references one candidate in the said race who is a member of this Court and who has recused himself in this case; and that the said survey does not reference another member of this Court who also has recused himself in this case, but who is not a candidate in the said race.

The said motion relies on arguments which relate to the 2004 campaign and which could have been advanced in a timely manner, but have instead been raised now, nearly four years after the 2004 race, during the pendency of a new 2008 political race. Citing no good cause for the delay in raising issues which could have been earlier raised, the said motion is untimely.

Furthermore, a "survey" which appears to be a "push poll" specifically designed with limited information for the purpose of supporting the instant joint motion, is, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.

For these reasons, and for the reasons more fully set forth in my prior memoranda, the pending joint motion seeking my disqualification is DENIED.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April 2008, the following order was made and entered:

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

vs.) No. 33350

A. T. Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his continued refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

OPPOSITION BRIEF

08

Supreme Court, U.S.
FILED
SEP 3 - 2008
OFFICE OF THE CLERK

(2)

No. 08-22

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF FOR RESPONDENTS IN OPPOSITION

D. C. OFFUTT, JR.
OFFUTT NORD, PLLC
P. O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

LEWIS F. POWELL III
Counsel of Record
RYAN A. SHORES
ROBERT W. LOFTIN
HUNTON & WILLIAMS LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for Respondents

SEPTEMBER 3, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment required Justice Brent D. Benjamin of the Supreme Court of Appeals of West Virginia to recuse himself from participating in a case because of lawful campaign expenditures where (a) there is no allegation that the campaign expenditures created any actual bias; (b) the campaign expenditures allegedly creating the appearance of bias were made by an officer of a party, not the party itself; (c) the expenditures were made independently of Justice Benjamin's campaign; and (d) the expenditures occurred before Justice Benjamin became a member of the Supreme Court of Appeals and before the underlying case was pending at that court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., were defendants-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that A.T. Massey Coal Company, Inc. is wholly owned by Massey Energy Company, which is a publicly traded company. Massey Energy Company has no parent corporation, and Fidelity Management & Research owns 10% or more of its stock. Massey Coal Sales Company, Inc. is wholly owned by A.T. Massey Coal Company, Inc. Elk Run Coal Company, Inc. is wholly owned by A.T. Massey Coal Company, Inc. Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. are wholly owned by Elk Run Coal Company, Inc. No other publicly traded company has any ownership interest in Massey Coal Sales Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., or Performance Coal Company, Inc.

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HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,
v.

A.T. MASSEY COAL COMPANY, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. (collectively "Respondents" or "Massey"), respectfully submit this brief in opposition to Petitioners' petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a-147a) is not yet published but is electronically reported at 2008 WL 918444. Justice Benjamin filed a concurring opinion on July 28, 2008 (Pet. Supp. App. 1a-64a), which Petitioners submitted with a supplemental brief. Justice Benjamin's orders declining to recuse himself

(Pet. App. 148a-51a, *id.* at 152a-56a, and *id.* at 157a-59a) are not reported.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008 (Pet. App. 1a-94a). The petition for a writ of certiorari was filed on July 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

This case involves an attack on a judgment by the Supreme Court of Appeals of West Virginia, which, applying everyday principles of res judicata and forum selection, twice reversed a $50 million compensatory and punitive damages award. Petitioners here do not challenge the correctness of the court's application of the law in the case. Rather, Petitioners seek review on the ancillary ground that one of the justices *appeared* to be biased.

Petitioners claim that Justice Brent Benjamin's refusal to recuse himself deprived them of due process. They do not claim that Justice Benjamin was actually biased, which is required to trigger recusal under due process. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002) (explaining the Court's due process cases as "guarantee[ing] a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party"). Instead, Petitioners ask this Court to hold that the Due Process Clause is triggered by bad appearances and that—as "evidenced" by newspaper editorials and a push

poll—to some it appeared inappropriate for Justice Benjamin to sit after a corporate officer made independent expenditures during his election several years earlier.

But the "Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance." *Del Vecchio v. Ill. Dep't of Corrections*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc). And courts repeatedly have rejected the claim that a lawful campaign contribution to a judge mandates recusal under the Due Process Clause or even the lower bar set by state statutes and canons. Because there was no due process violation, and because there is no conflict in the courts regarding when campaign expenditures require recusal under the Due Process Clause, this Court should deny the Petition.

A. The 2004 Election

As in 38 other States, the people of West Virginia have chosen to elect their judges. In 2004, Brent Benjamin ran for and won a seat on the Supreme Court of Appeals, defeating incumbent Justice Warren McGraw.

Petitioners' due process claim focuses on the 2004 election expenditures of one of Massey's officers, Don Blankenship. The Petition attempts to paint the picture that Mr. Blankenship personally set out to "buy a seat" on the appellate court in order to influence a case involving Massey that was pending in the trial court and that had only a chance years later of being accepted for appellate review.

The *complete* facts thoroughly rebut this grand conspiracy theory.

Mr. Blankenship is and was at the relevant time Massey's board chairman, CEO, and president. Massey is a publicly traded company, and Mr. Blankenship has owned less than 1% of its stock from 2004 to the present. *See, e.g.*, Massey Energy Company 2008 Proxy Statement at 16 (Apr. 15, 2008). Mr. Blankenship has long been active in politics in West Virginia. In 2004, he—like many others from *both* parties—opposed the reelection of Justice Warren McGraw, an extremely polarizing figure in West Virginia. Motion of Petitioner Corporations for Disqualification of Justice Benjamin ("Corp. Disqualification Mtn.") Ex. 36. Mr. Blankenship's reason for expending his personal funds in the election are best summed up by his mantra that "[a]nybody would be better than McGraw for the state." *Id.* Ex. 9.

Mr. Blankenship made a single $1,000 contribution to Justice Benjamin's campaign. *Id.* Ex. 28. Mr. Blankenship also directly expended $517,707 on the election, primarily in opposition to Justice McGraw. *Id.* Exs. 24, 28. By law, these expenditures were made "independently of [Justice Benjamin's] campaign and without the cooperation or consent, or in consultation with, the candidate or the candidate's agents." *Id.* Ex. 18 (W. Va. Official Form F-7B (revised 7/03)).

The Petition focuses, however, on Mr. Blankenship's separate contributions totaling $2,460,500 to an Independent Expenditure Group ("527" Group) called "And for the Sake of the Kids"

("ASK"). Corp. Disqualification Mtn. Exs. 10-12. ASK was opposed to Justice McGraw in the election, focusing on his record on criminal law issues. *Id.* Ex. 44. Justice Benjamin's campaign was "completely independent" of ASK and had no connection with or control over what ASK did or said. Pet. Supp. App. 39a, 51a. In fact, Justice Benjamin's campaign specifically announced that it "absolutely [was] not" working with ASK. Corp. Disqualification Mtn. Ex. 44.[1]

As he noted in his denials of the recusal motions, since his election in 2004 Justice Benjamin has participated in a number of cases involving Massey and/or Massey subsidiaries. *See U.S. Steel Mining Co., LLC v. Helton*, 631 S.E.2d 559 (W. Va. 2005); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006); *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008). And in all of those cases, Justice Benjamin voted *against* Massey. They include a case involving a $220 million compensatory and punitive damages award against Massey—well over four times the size of the damages here—in which Justice Benjamin voted to deny review. *See Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008), *petition for cert. filed*, No. 08-218, 2008 WL 3884291 (U.S. Aug. 20, 2008).

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[1] Just as Mr. Blankenship gave money to ASK, many others—including Petitioner Caperton, one of Petitioners' lawyers, and one of the law firms representing Petitioners—gave money to the West Virginia Consumers for Justice, which spent $1.5 million in support of Justice McGraw's campaign. *See* Supplemental Brief of Appellants on Rehearing at 30 n.6.

Before the instant case, no party—including the Attorney General of West Virginia, Darrell McGraw (Justice McGraw's brother and a prior Chief Justice of the Supreme Court of Appeals)—had ever sought Justice Benjamin's recusal from a case involving Massey. Pet. App. 153a-54a. In fact, the head of the West Virginia Department of Environmental Protection said she "would not have entertained" attempting to recuse Justice Benjamin in a matter involving Massey. *Id.* at 154a.

B. The Appeal And Recusal Motions

The underlying case involves a battle over coal supply. The basis of Petitioners' substantive legal claim was that Massey purchased Wellmore Coal Corporation ("Wellmore"), through which Petitioner Harman supplied coal to LTV Steel ("LTV"), in order to sell Massey coal to LTV and to eliminate Harman as a competitor. When LTV stopped buying coal from Wellmore in 1997, Massey caused Wellmore to invoke a *force majeure* clause in its supply contract with Harman. This, along with other conduct by Massey, allegedly forced Harman out of business. *Id.* at 7a-11a.

In October 1998, Petitioners sued Massey in Boone County, West Virginia—despite the mandate in the relevant contract's forum selection clause that any suit under the contract be brought in Virginia (where there is a $350,000 cap on punitive damages, *see* Va. Code § 8.01-38.1). In fact, corporate Petitioners already had filed suit in Virginia in May 1998 based on the same course of events and ultimately won a jury verdict of $6 million in damages. On August 1, 2002, a Boone County jury

awarded Petitioners approximately $50 million in compensatory and punitive damages. Pet. App. 12a-13a. Over two years later, on March 17, 2005, the trial court denied Massey's post-trial motions. *Id.* at 13a.

On October 24, 2006, nearly two years after Justice Benjamin's election, Massey filed a Petition for Appeal seeking review by the Supreme Court of Appeals. A year earlier, on October 19, 2005, Petitioners had filed separate "pre-petition" motions seeking Justice Benjamin's recusal. Petitioners claimed that Mr. Blankenship's expenditures created an appearance that Justice Benjamin would not be impartial in considering Massey's appeal. *See* Corp. Disqualification Mtn. at 22 (titling the "Legal Argument": "IN THE EYES OF THE PUBLIC, JUSTICE BENJAMIN'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IN THIS CASE; THEREFORE, RECUSAL IS NECESSARY.").[2] As "evidence" of the supposed bad appearances, Petitioners relied on a number of exhibits, primarily newspaper articles and editorials.

On April 7, 2006, Justice Benjamin denied the motions. He explained that the Petitioners presented no objective basis for his recusal and

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[2] Given that these recusal motions and all subsequent recusal motions rested solely on an alleged appearance of bias, it is not surprising that the recusal motions focused on West Virginia's Canons governing judicial recusals and only casually mentioned due process. *See* Corp. Disqualification Mtn. at 22-26; Hugh M. Caperton's Motion for Disqualification Directed to Justice Brent D. Benjamin at 7 (arguing there was a "perception of partiality" requiring recusal under Canons 3(E)(1) and 2(B) and not even mentioning due process).

instead rested on "surmise, conjecture, and political rhetoric." Pet. Supp. 148a.

On April 5, 2007, two-and-one-half years after Justice Benjamin's election, the Supreme Court of Appeals unanimously granted review on Respondents' appeal.[3] Having their Petition for Appeal granted was far from certain for Respondents: In 2007, the Supreme Court of Appeals granted only 17% of the discretionary appeals that it reviewed. *See* Supreme Court of Appeals of West Virginia - 2007 Statistical Report at 5.

On November 21, 2007, three years after Justice Benjamin's election, the Supreme Court of Appeals reversed the decision of the trial court on two independent grounds: the forum selection clause and res judicata. The majority's 63-page opinion, which was authored by then-Chief Justice Davis and joined by Justices Maynard and Benjamin, carefully analyzed every element of both claims and cited settled federal and state authority in support. *Caperton v. A.T. Massey Coal Co., Inc.*, No. 33350 (W. Va. Nov. 21, 2007).

Justice Starcher filed a three-page dissent calling the majority opinion "Horse Puckey!" *Id.*, slip op. at 2 (Starcher, J., dissenting). Justice Albright also filed a dissent that acknowledged the majority's "numerous cases for its various propositions" but derided the majority for ignoring the "essential

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[3] In deciding whether to accept an appeal, all five Justices vote, and their votes are recorded. Three votes are required to grant an appeal. W. Va. Const. art. 8.4; W. Va. Code §§ 51-1-1, 51-3-4.

justice of plaintiffs' suit." *Id.*, slip op. at 4, 7 (Albright, J., dissenting).

Petitioners sought rehearing in December 2007. While these petitions were pending, Chief Justice Maynard recused himself based on personal contacts he had had with Mr. Blankenship. So, too, did Justice Starcher, who had publicly and repeatedly manifested substantial, actual bias against Massey.[4] Justice Benjamin, as the next justice in line for the chief justiceship, appointed two circuit judges, Judge Cookman and Judge Fox, to fill the places of Chief Justice Maynard and Justice Starcher.[5] The

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[4] For example, Justice Starcher called Massey's chairman "stupid," a "clown," and an "outsider," and criticized Massey itself as detrimental to West Virginia. *See* Motion for Disqualification of Justice Starcher at 4-7 and Exs. A-G. Despite his admitted bias against Massey, Justice Starcher reversed direction in the subsequent *Wheeling* case involving Massey, refused to recuse himself, and declared that, if his participation created a due process problem, "so be it." Petition for Certiorari, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 08-218, at 4 (filed Aug. 20, 2008). Massey is seeking this Court's review in the *Wheeling* case on the ground, *inter alia*, that Justice Starcher's participation in the decision to refuse review of Massey's appeal violated due process because he was *actually* biased. Because the *Wheeling* Petition concerns *actual* bias (which is covered by the Due Process Clause), while the Petition here is based solely on an alleged *appearance* of bias (which is not covered by the Due Process Clause), there would be no inconsistency in denying this Petition while granting and reversing in *Wheeling*.

[5] Citing a newspaper article as authority, the Petition suggests that Chief Justice Maynard, Justice Davis, and Justice Benjamin—the three who originally voted in favor of Respondents—manipulated the rotation for the chief justiceship to move Justice Benjamin ahead of Justice Albright. Pet. 13 n.4. But as Justice Benjamin explained in detail in his

reconstituted court voted to rehear the case, and the appeal was considered anew. *See State ex rel. Moats v. Janco*, 180 S.E.2d 74, 83 (W. Va. 1971) (explaining that the "granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect").

In addition to seeking Chief Justice Maynard's recusal, the corporate Petitioners "renewed" their motion to recuse Justice Benjamin based on the 2004 campaign expenditures. Justice Benjamin denied the motion for the same reasons he expressed earlier and because of the additional passage of time from the 2004 election. Pet. App. 152a-53a.

Later, on March 28, 2008, Petitioners filed a "Second Renewed Joint Motion for Disqualification of Justice Benjamin." This motion was based solely on a survey commissioned by Petitioners, which they claimed showed that citizens perceived Justice Benjamin to be biased in favor of Massey. *Id.* at 158a. On April 3, 2008, Justice Benjamin denied the motion as untimely. *Id.* Justice Benjamin further explained that the basis of the motion—a "push poll"—was "specifically designed with limited information for the purpose of supporting the instant joint motion; [and] is, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." *Id.*

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concurrence (with reference to an attached Exhibit setting out the rotation), this suggestion is "frankly, absurd" and "grossly unfair to the two outstanding jurists, Judges Fox and Cookman." Pet. Supp. App. 62a n.49. Notably, Judge Cookman voted against Massey on rehearing.

On April 3, 2008, the Supreme Court of Appeals again reversed the trial court based on the forum selection clause and res judicata. Justice Davis authored the 94-page majority opinion, which was joined by Judge Fox and Acting Chief Justice Benjamin. *Id.* at 1a-94a. As the previous majority opinion did, this majority opinion carefully reviewed every element of each claim and cited an overwhelming body of legal authority. The court adopted the Second Circuit's four-part test for determining whether a claim should be dismissed based upon a forum selection clause. *Id.* at 19a-20a (outlining the test articulated in *Phillips v. Audio Active Limited*, 494 F.3d 378, 383-84 (2d Cir. 2007), which is based upon the test articulated by this Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The court then applied settled law to hold that the forum selection clause was reasonably communicated, mandatory, applied to the claims and parties at issue, and that Petitioners did not rebut the presumption of enforceability of the clause.

In addition, the court held "that, assuming arguendo the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata." Pet. App. 72a. The court again carefully analyzed the law governing the preclusive effect of foreign judgments, *see id.* at 73a (discussing and applying the Full Faith and Credit Clause, U.S. Const. art. IV, § 1), and held that Petitioners' action was barred by the prior judgment in Virginia.

Justice Albright (joined by Judge Cookman) filed a dissent with the same tone as Justice Albright's previous dissent. *Id.* at 95a-147a. As the

Petition notes, the dissenters in a footnote cited *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133 (1955), in reference to Justice Benjamin's participation in the case. Pet. App. at 146a-47a n.16. The Petition omits, however, the next sentence from the dissent: "On the record before us, we cannot say with certainty that those cases have application here." *Id.* at 147a n.16.

Justice Benjamin filed a concurrence rejecting the suggestion that his participation violated due process. He explained that no one had claimed that there was "any actual bias or prejudice on my part in this case." Pet. Supp. App. 20a. He further rejected Petitioners' "appearance-based" due process test that focused on "subjective perceptions." *Id.* at 25a, 29a. Finally, Justice Benjamin explained that a complete set of the pertinent facts and a review of his record undermined any claim for recusal. *Id.* at 38a-40a.

ARGUMENT

Justice Benjamin's participation did not deprive Petitioners of due process. Neither this Court nor any other court has ever held that a popularly elected judge must recuse himself when an individual, who is neither a party nor an attorney appearing before the judge in pending litigation, makes campaign expenditures independent from and outside the control of the judge's campaign. Petitioners make no claim of any actual bias on Justice Benjamin's part, and their claim that an appearance of bias rises to the level of a due process violation has no merit. The Court should deny review for five reasons.

First, Justice Benjamin's participation in this case fully comported with due process. Petitioners have never even claimed (at least until a footnote in their Petition here) that Justice Benjamin had a "'direct, personal, substantial, [or] pecuniary interest'" in the outcome of the case, which is required under this Court's due process recusal cases. *Aetna*, 475 U.S. at 821-22 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

Second, there is no split of authority on the actual question presented: whether Justice Benjamin's participation was barred by due process because of Mr. Blankenship's independent campaign expenditures. A number of cases have rejected due process challenges to a judge's participation in a case when the judge received campaign contributions (to say nothing of independent expenditures) from a party or a lawyer. By contrast, the Petition and the five *amicus curiae* briefs supporting the Petition have identified only one case where a court has held that due process required recusal of a judge who received campaign contributions. *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). But the court in *Pierce* limited its holding to the situation where contributions are made to a judge's campaign while the judge is overseeing an *ongoing* case of the contributor—a situation not implicated here.

Third, the Petition does not offer the Court a workable constitutional standard for when recusal will be constitutionally required. If anything, requiring recusal based on the vague "substantial" expenditure test suggested by the Petition would raise serious First Amendment concerns. Moreover, the facts of this case provide a poor vehicle to resolve

when financial support reaches a level that constitutionally requires recusal.

Fourth, the Petition urges the Court's intervention due to the changing dynamics of State judicial elections. But the respective States are well-positioned to handle—and are in fact handling—these changing dynamics. It would be unwarranted and at least premature for the Court to enter this area of traditional state concern, wielding the blunt instrument of a federal due process ruling.

Fifth, the Petition attempts to paper over the lack of a split of authority by asking the Court to rule *generally* on whether the Due Process Clause requires recusal where there is a mere *appearance* of bias. This Court has never adopted a "looks bad" due process test. Moreover, the alleged split on whether bad appearances require recusal under due process is exaggerated, and this is not in any event a suitable vehicle to consider this generalized question.

I. CERTIORARI IS NOT WARRANTED ON THE QUESTION PRESENTED

Justice Benjamin's participation was consistent with the due process cases of this Court and of all the state and lower federal courts. As it has done in the past, *see, e.g.*, *Avery v. State Farm Mut. Auto. Ins.*, 547 U.S. 1003 (2006), the Court should deny certiorari on the question presented.

A. Justice Benjamin's Participation Was Consistent With Due Process

There are two fundamental tenets in this Court's constitutional recusal cases, both of which

are ignored by the Petition. *First*, there is a heavy "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *Second*, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *see also Aetna*, 475 U.S. at 820 ("'[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'") (quoting *Tumey*, 273 U.S. at 523).

Based on these principles, this Court has strictly limited the space in which the Due Process Clause—as opposed to codes and ethical canons—mandates disqualification. Specifically, a judge cannot constitutionally hear a case where the judge has a "'direct, personal, substantial, [or] pecuniary interest'" in the outcome of the case—*i.e.*, where the judge harbors some form of substantial actual bias. *Aetna*, 475 U.S. at 821-22 (quoting *Tumey*, 273 U.S. at 523). By contrast, due process does *not* require recusal where the judge has a mere "general" interest in the case that is "too remote and insubstantial to violate the constitutional constraints." *Id.* at 826 (internal quotation marks and citation omitted).[6]

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[6] Thus, in *Aetna* the Court held that a justice's general antipathy toward insurance companies did not require recusal under due process. 475 U.S. at 820-21. Indeed, the Court expressed doubt whether this type of "general" bias would ever trigger due process concerns. *Id.*

Justice Benjamin's participation was consistent with this Court's due process standard and did not implicate any of the classes of cases in which the Court has mandated recusal under that standard. Justice Benjamin had no pecuniary interest in the outcome of the case. *Id.* at 824 (recusal required where justice's ruling "enhanc[ed] both the legal status and the settlement value of" the justice's own pending lawsuit); *Tumey*, 273 U.S. at 523 (accord); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (accord). Nor did he serve two inconsistent roles, such as prosecutor and adjudicator. *See Murchison*, 349 U.S. at 137 (recusal required where the judge was a "one-man grand jury" accusing defendants then presiding over their trial). Nor was he subjected to a litigant's contemptuous abuse or "embroiled in a running, bitter controversy" with a litigant. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). To the contrary, Justice Benjamin did not manifest any inclination of dislike or favoritism with respect to any party in the case. There is no basis for believing that Petitioners failed to receive what due process guarantees: an actually impartial judge who "will apply the law to [these parties] in the same way he applies it to any other party." *White*, 536 U.S. at 776.[7]

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[7] For the first time in this case, and without any further analysis, Petitioners claim in a footnote that "Mr. Blankenship's expenditures on Justice Benjamin's campaign were so significant they implicate . . . this Court's decisions regarding actual pecuniary interests." Pet. 20-21 n.5. This argument is waived and, in any event, meritless. If the Petition is arguing that Justice Benjamin was influenced to vote for Massey to curry financial support for a reelection campaign many years in the future (W. Va. Const. art. 8-2 (justices serve 12-year terms)), the argument is factually baseless, and the

A more complete account of the relevant facts reinforces the conclusion that Justice Benjamin's participation in this case was consistent with due process. Indeed, his participation was likewise consistent with the standards established by codes and canons, which (unlike the Due Process Clause) generally require recusal based on a mere appearance of bias.

First, the case was not pending before Justice Benjamin, or even the Supreme Court of Appeals, during the time the expenditures were made by Mr. Blankenship. *See, e.g., Gluth Bros. Constr., Inc. v. Union Nat'l Bank*, 548 N.E.2d 1364, 1368 (Ill. App. Ct. 1989) (recusal not required under Illinois canon because there was no "present, ongoing" relationship; explaining that the "common theme" in cases requiring recusal based on campaign activity is the judge's "present, ongoing relationship with the attorney while the case [is] still pending").

Second, the Supreme Court of Appeals accepted the appeal almost two-and-one-half years after the election, and the decision from which Petitioners are appealing occurred over three years after the election. *See, e.g., Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1457, 1458 (D. Colo. 1997) (recusal not required under 28 U.S.C. § 455 where alleged biasing event occurred years earlier).

Third, the allegations focus not on the expenditures of a lawyer or party, but an officer of a party. *Cf. Gilbert v. DaimlerChrysler Corp.*, 669 N.W.2d 265, 266 (Mich. 2003), *cert. denied*, 546 U.S.

Petition cites no authority remotely supportive of that suggestion.

821 (2005) (recusal not required under Michigan code based on campaign contributions and expenditures made by a non-party *amicus*).

Fourth, virtually all of the money spent by Mr. Blankenship was independent of Justice Benjamin's campaign, and Justice Benjamin had no ability to control whether or how those funds were spent.

Fifth, no one, other than counsel for Petitioners in this case, has ever sought to have Justice Benjamin recused from cases involving Massey.

Finally, except for this case, Justice Benjamin's voting record is uniformly *against* Massey, including a case involving many times the damages here. *See Jackson v. Ft. Stanton Hosp. and Training Sch.*, 757 F. Supp. 1231, 1242 (D.N.M. 1990) (rejecting plaintiffs' recusal motion under 28 U.S.C. § 455 where "in the main, [the judge] ruled in favor of the plaintiffs and granted them very significant relief"). These facts, especially when combined with the "presumption of honesty and integrity in those serving as adjudicators," *Withrow*, 421 U.S. at 47, refute any possible basis for recusal under even the codes and canons, much less the Constitution.

B. There Is No Split Of Authority On The Question Presented

Petitioners cite *one* case addressing whether due process requires recusal due to campaign contributions. In fact, a wealth of cases have rejected the argument that due process requires recusal because of campaign contributions. *See, e.g.*, *Public Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743,

746 (W.D. Tex. 2000) ("[T]he Court finds campaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment."); *Georgeadis v. County of Franklin*, No. C-2-99-1027, 2000 WL 1459369, at *3 (S.D. Ohio Sept. 22, 2000) (same); *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 310-11 (E.D. Pa. 1998) (same and collecting cases where state courts "have held that a judge is not ethically, let alone constitutionally, required to recuse" due to campaign contributions); *see also Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003, 1020 (Nev. 1989) (accord), *abrogated on other grounds by Powers v. United Services Auto. Ass'n*, 962 P.2d 596 (Nev. 1998).

The lone case cited in the Petition or uncovered by our research in which a court, under any scenario, has ever found a due process violation related to a judge's failure to recuse himself because of campaign contributions is *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). But even this outlier is not inconsistent with Justice Benjamin's participation in this case. *Pierce* found that due process required a trial judge's disqualification where the litigant's attorney and the attorney's father made campaign contributions to the judge's campaign while the litigant's case was pending before that judge. *Pierce* is plainly not implicated here.

First, the court in *Pierce* carefully limited its holding to contributions that "occur during a pending case in which the lawyer is appearing before that judge." *Id.* at 798. This "ongoing case" limitation is

consistent with the only other case to even suggest (in dictum) that campaign contributions might require recusal under due process. *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337-38 (Fla. 1990) ("[I]t would be highly anomalous if . . . *prior participation* in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal.") (emphasis added; citation and quotation marks omitted); *see also Gluth Bros.*, 548 N.E.2d at 1368 (explaining the ongoing case limitation in the cases applying state canons and codes). Here, the case was not pending in the Supreme Court of Appeals—much less pending before Justice Benjamin, who was not yet on the court—when the expenditures were made.

Second, *Pierce* involved *direct contributions to a judge's campaign*. *Id.* at 793. By contrast, with the exception of a $1,000 contribution to Justice Benjamin's campaign, the money spent here was in the form of *independent expenditures* that were not connected with Justice Benjamin's campaign or otherwise under his control or authority.

Finally, whereas in *Pierce* the contributions were made by a party's attorney, here the money spent came from the personal funds of one of Massey's many officers, whose interest in the outcome of this case was greatly diluted compared to that of the parties themselves. Even if *Pierce* is correct, it is not relevant here.

C. The Petition Does Not Offer A Workable Constitutional Standard And Raises Serious First Amendment Concerns

Review is particularly unwarranted here, because the Petition cannot offer a workable constitutional standard that would practicably guide future cases. The Petition claims that the Constitution should require recusal where expenditures are "substantial." Pet. 28. This is hardly a precise formulation. The various rules suggested by *amici* are no clearer. *See* ABA Amicus Br. 5 ("significant"); Brennan Center, *et al.* Amicus Br. 9 ("massive"); Committee for Economic Development Amicus Br. 2-3 ("disproportionately large," or "outsized,"); Public Citizen Amicus Br. 3 ("eye-catching"). As the Washington Appellate Lawyers Association candidly acknowledges: "It is probably impossible to establish a bright line test for the level of contribution or independent expenditure that would give rise to a due process violation." Washington Appellate Lawyers Ass'n Amicus Br. 16. That the Petition and *amici* cannot come up with a useful standard for courts to implement is not surprising. As this Court noted in addressing caps on campaign contributions: "[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam) (internal quotation marks and citation omitted).

The vague recusal standard suggested by the Petition raises serious First Amendment concerns. The First Amendment protects contributions and expenditures in judicial elections. *See, e.g.*, *Buckley*,

424 U.S. at 14 (explaining that contribution limitations "operate in an area of the most fundamental First Amendment activities"); *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association."). If lawyers and litigants knew that their contributions or expenditures might force a judge's recusal, then they could be chilled from exercising their First Amendment rights. And the chilling effect would extend beyond the limited class of actually disqualifying contributions or expenditures because there would be no way for the lawyers and litigants to know *ex ante* what "substantial" means—especially if "substantial" were to be governed by appearances.[8] *See, e.g., Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2682 n.5 (Scalia, J., concurring in part and concurring in the judgment) (rejecting a "wait-and-see approach" in determining the risk that "a standard will have an impermissible chilling effect on First Amendment protected speech" in favor of the Supreme Court's "normal practice" of assessing the risk *ex ante*). These First Amendment concerns

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[8] This is far from hypothetical. For example, in some localities, there is only one elected trial judge. If financially supporting that judge would trigger recusal under due process, many lawyers who practice in that locality would have no choice but to refrain from exercising their First Amendment rights. *See Roe v. Mobile County Appointment Board*, 676 So. 2d 1206, 1233 (Ala. 1995) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.").

are further caution that the Court should not enter this field without a clear standard, which Petitioners are unable to provide.

The Petition also does not answer other difficult questions implicated by the facts of this case. Notably, some of these questions are predicate to the question allegedly warranting this Court's review—when financial support reaches a level that constitutionally requires recusal—and therefore make this a poor vehicle to consider that question. Pet. 28. These include, *first*, whether due process recusal extends beyond a corporate party itself to corporate officers or even shareholders; *second*, whether due process mandates recusal in a case that is not before the judge whom the party or attorney supported, but may come before the judge at some point in the future; and *third*, whether due process mandates recusal based on independent expenditures outside of the judge's control, as opposed to contributions made to the judge's campaign—the only context in which a court has ever suggested that recusal may be constitutionally required.[9]

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[9] Moreover, there are host of other questions that this Court would need to answer in order to provide meaningful guidance to state courts, for which the Petition has no answer. These include, *first*, whether the due process threshold should be the same for both supreme court justices, who must often run a state-wide campaign, and other state judicial officers, who may have to run only in a particular locality; *second*, whether due process mandates recusal where parties or attorneys have given money used to oppose the judge's campaign; and *third*, how if at all due process will regulate an enterprising litigant that uses the recusal rules opportunistically by, for example, giving to

The issues outlined above have challenged state legislative and regulatory bodies defining state codes and canons. *See* Thomas R. Phillips, Comment, *Judicial Independence and Accountability: Judicial Independence and Democratic Accountability in Highest State Courts*, 61 Law & Contemp. Probs. 127, 131-32, 136-37 (1998). But, as discussed below, the task of sorting these out—and the general task of addressing developing campaign dynamics—should be left to those bodies and not constitutionalized and taken over by courts. *See Shepherdson*, 5 F. Supp. 2d at 311 ("If questions about campaign contributions and recusal are to be constitutionalized, federal courts will be required to engage in the type of policy making more appropriately undertaken by the pertinent state authorities.").

D. It Is Unnecessary And At Least Premature For The Court To Invade This Area Of Primary State Concern

The Petition claims that the Court should step into this area now because of the recent increase in money spent on judicial elections. Pet. 26-28. But the Petition would have the Court ignore the fact that States are addressing that trend. There is no need for emergency constitutional relief.

For example, States that elect judges have regulations governing judicial campaigning and how campaigns are financed. Moreover, States are modifying those laws to address the state-election shortcomings perceived by the Petition. Notably,

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judges that seem antagonistic to the litigant's cause, in order to secure their recusal.

following the 2004 election at issue here, West Virginia amended its campaign finance laws related to judicial elections. *See* West Virginia H.B. 402, 2005 W. Va. Acts 4th Ex. Sess., ch. 9, eff. Sept. 13, 2005. Among its provisions, the new law requires registration of 527 Groups, requires financial disclosures from 527 Groups, and sets a $1,000 cap per election on what an individual can contribute to a 527 Group operating in West Virginia. W. Va. Code § 3-8-12.

In addition, three states—New Jersey, North Carolina, and Wisconsin—now have some form of public financing system for judicial campaigns. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing, available at* http://www.judicialselection.us/ (last accessed Aug. 30, 2008). And many other state legislatures (including West Virginia's) are actively considering a public finance system for judicial elections. *See* National Center for State Courts, *Gavel to Gavel: A Review of State Legislation Affecting the Courts*, at 1, 3 (June 2008) (explaining that in 2008 Georgia and West Virginia established committees to investigate public financing and that public financing bills have also been filed in other States). Indeed, there are even States that, by code, do what Petitioners ask the Court to do by constitutional mandate: require recusal because of campaign contributions.[10]

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[10] *See* Ala. Code §§ 12-24-1, -2 (recusal linked to campaign contributions under certain circumstances); Miss. Code of Jud. Conduct Canon 3E(2) (same); *see also* Wash. Code of Jud. Conduct, comment to Canon 7(B)(2) (contributions relevant to recusal); N.D. Code of Jud. Conduct, comment to Canon 5(C)(2) (same); Tenn. S. Ct. R. 10 (Code of Jud. Conduct), commentary

This Court has always been reluctant to invade an area traditionally reserved for state regulation, such as state judicial elections and state recusal policy. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (rejecting a due process challenge to a state statute in an area traditionally regarded as in the "province of the States"). But especially where States are actively addressing the concerns that allegedly justify Court intervention—and there is no one-size-fits-all regulation that will address those concerns—the request for intervention is unwarranted. The States are actively at work preserving and promoting both judicial integrity and popular election of judges. This Court should allow them to continue this work.[11]

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to Canon 5(C)(2)(b) (same); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2) (same). Nineteen states also permit each party a peremptory disqualification of a trial judge, which enables a party to disqualify one judge per proceeding--including a judge the party perceives to be biased due to campaign activity. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 789-822 (2d ed. 2007) (hereinafter "*Judicial Disqualification*").

[11] The types of judicial offices subject to election and the ways in which judges are elected vary widely both across States and even within States. *See, e.g.*, The Council of State Governments, *The Book of the States* 133-35 (1996-97 ed.) (listing selection and retention methods for judges). A federal due process ruling would implement a nationwide standard that would be heedless of all the differences among States respecting their judicial elections.

II. CERTIORARI SHOULD NOT BE GRANTED ON THE BROADER QUESTION WHETHER APPEARANCE OF BIAS IS SUFFICIENT TO REQUIRE RECUSAL UNDER DUE PROCESS

Recognizing the lack of a split of authority on the specific question presented by this case—whether due process mandated recusal based on campaign expenditures—the Petition seeks to turn the Court's attention to the broader question of whether a mere appearance of bias can ever be sufficient to require recusal under due process, a question on which there is likewise no serious split of authority. Appearances are the stuff of codes and canons—not the Constitution. But even if this generalized question were worthy of review, this case is a poor vehicle to consider the question.

A. The Constitutional Standard Is Distinct From The Appearance Standard In Codes And Canons

In arguing that an appearance of bias violates due process, Petitioners' fundamental error is that they have confused the *constitutional* recusal standard with recusal standards imposed by *codes* and *canons*. *See Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."); *Tumey*, 273 U.S. at 523 (similar).

The Due Process Clause ensures an individual litigant an actually fair trial and therefore an actually impartial adjudicator. *See White*, 536 U.S. at 775-76. By contrast, the federal recusal statute

and many state judicial canons, including West Virginia's, have broader aims—including ensuring that the adjudicator *appears* impartial to the litigant and the public. *See, e.g., Liteky v. United States*, 510 U.S. 540, 548 (1994) (explaining that, under the federal recusal statute, 28 U.S.C § 455, "what matters is not the reality of bias or prejudice but its appearance"); *In re Reese*, 495 S.E.2d 548, 550 (W. Va. 1997) (discussing that West Virginia's Canons prohibit "the appearance of impropriety"). As the Eighth Circuit explained: "In contrast to the due process clause, the recusal statute is concerned largely with insuring that the federal judiciary appears to be impartial, in addition to actually being impartial. It thus reaches farther than the due process clause, which is concerned primarily with the individual rights of parties." *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003).[12]

If the Court were to hold that the appearance of bias triggers recusal under due process, that would in effect constitutionalize the federal recusal statute and many state codes and canons, a step that in other contexts the Court has been loath to take. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Such a holding also would turn the courts into the new rulemakers on recusals, and open the floodgates to new and unending constitutional bias claims. *Del*

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[12] *See also Judicial Disqualification* 35-36 (explaining that, while the Due Process Clause has "been interpreted to require only an absence of actual bias on the judge's part . . . under the ABA Code of Judicial Conduct—as well as the judicial disqualification jurisprudence that is in force in many states—an appearance of bias alone may be sufficient to warrant disqualifying a judge").

Vecchio, 31 F.3d at 1389 (Easterbrook, J., concurring) (explaining "'[a]ppearance' problems lurk everywhere, for they are in the eye of the beholder. . . . This brand of argument cannot be cabined.").

The deficiency in the Petition is evident from its sweeping position that mere appearances control, thus eviscerating the long-standing distinction between actual and apparent bias. The Petition reasons that when there is an appearance of bias (*i.e.*, when it "looks bad" for the judge to sit) there must be a possibility of actual bias, and this possibility requires the judge to step aside in order to avoid even the chance of actual bias. *See* Pet. 18 (arguing due process requires recusal where there is an appearance of bias "because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety") (emphasis in original). But if the appearance of bias were deemed tantamount to the possibility of actual bias,[13] and the possibility of actual bias were to require recusal, then the historic distinction between apparent and actual bias would evaporate.

B. This Court's Cases Do Not Hold Appearances Sufficient To Require Recusal

Petitioners' due process theory—that bad appearances alone compel recusal—is not supported by this Court's cases. The Petition relies primarily on dicta from a handful of this Court's due process cases that mention "appearances," including cases that do not involve judicial recusal at all. *See Peters*

[13] As discussed below, appearance of bias is *not* tantamount to even the possibility of actual bias.

v. Kiff, 407 U.S. 493, 502 (1972). But in every case in which the Court has held that due process mandates a judge's recusal, that *holding* has been based on actual bias: the judge in *Aetna* had an actual pecuniary interest in the outcome, 475 U.S. at 824-25; the judge in *Murchison* was structurally biased, 349 U.S. at 138-39; and the judge in *Mayberry* was the victim of the crime—extraordinary contemptuous verbal abuse—which rendered him unable to preside at the defendant's trial, 400 U.S. at 466. The due process holdings in these cases were based on the actualities, not simply on appearances.

Petitioners also rely on dicta from the Court's cases that they read to suggest that the "possibility" of actual bias is enough to require recusal under due process. Pet. 18-19. But this "Court's cases . . . go beyond generalizations about 'possible bias.'" *Del Vecchio*, 31 F.3d at 1375. Regardless, the "possibility" language in the Court's cases do not support the Petition's requested holding that due process prohibits the mere "appearance of bias" on the part of a judge. Pet. 21. Petitioners offer no justification for how the *appearance* of bias is equivalent to or a proxy for the possibility of actual bias, as their theory suggests. Even where it may *appear* to someone that a judge will be biased, there often will not be any real likelihood that judge will actually be biased.

The Court's most recent pronouncement on this issue, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), confirms that due process guarantees an actually—not an apparently—impartial judge. *White* explained the line of due process recusal cases as "guarantee[ing] a party that

the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776. Nothing in *White*'s articulation of the standard suggests that an appearance of applying the law with this impartiality is relevant, much less constitutionally required.

C. The Alleged Split Is Exaggerated

That this Court has never *held* that appearances require recusal under due process is confirmed by a recent line of federal appeals court cases applying 28 U.S.C. § 2254(d)(1) (allowing habeas relief where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). In each of these cases, the courts specifically considered and rejected the proposition that the Supreme Court's references to appearances are anything more than dicta, "let alone 'clearly establish[ing]' that the mere appearance of bias" violates due process. *Welch v. Sirmons*, 451 F.3d 675, 701 (10th Cir. 2006) (quoting *Johnson v. Carroll*, 369 F.3d 253, 263 (3d Cir. 2004)); *see also Davis v. Jones*, 506 F.3d 1325, 1336 n.20 (11th Cir. 2007) (discussing "the Supreme Court's dicta" regarding appearances); *Del Vecchio*, 31 F.3d at 1371-72. A host of State cases are in accord. *State v. Canales*, 916 A.2d 767, 781 (Conn. 2007); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006); *State v. Reed*, 144 P.3d 677, 681-83 (Kan. 2006); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D.

2004); *Kizer v. Dorchester County Vocational Educ. Bd. of Trs.*, 340 S.E.2d 144, 148-49 (S.C. 1986).[14]

In contrast to the overwhelming authority that actual bias alone triggers due process, the Petition cites only one federal case that allegedly has held that appearances alone are sufficient to trigger recusal under due process. *See Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989). But the Fourth Circuit has never held, in *Aiken* or any other case, that a judge is constitutionally disqualified due to appearances, nor does the issue ever really matter in federal cases, given the statutory appearance-based recusal requirement. Indeed, more recently the Fourth Circuit correctly has considered appearances under the statutory standard of 28 U.S.C. § 455. *See, e.g.*, *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) (citing § 455 and stating that if "a judge

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[14] In alleging a "three-way split," the Petition claims that these federal cases differ from the State cases in that, unlike the State cases, the federal cases "acknowledge . . . that, even in the absence of actual bias, there may be circumstances that 'give rise to a presumption or reasonable probability of bias' sufficient to establish a due process violation." Pet. 23 (quoting *Welch*, 451 F.3d at 700). But the language that the Petition quotes from *Welch* merely explains that the *dicta from this Court's opinions* "appear to pertain to situations in which the circumstances are sufficient to give rise to a presumption or reasonable probability of bias." *Welch*, 451 F.3d at 700; *see also Davis*, 506 F.3d at 1336 n.20. To the extent the Petition is referring to *Del Vecchio*'s suggestion that, even if a judge subjectively believes he can resist any bias, the objective evidence may be so strong that actual bias must be presumed, *see* 31 F.3d at 1373, 1375, there is nothing in this suggestion inconsistent with the view that the Due Process Clause is concerned only with *actual* bias.

possesses actual or apparent prejudice either for or against a party, federal law provides the aggrieved party with a statutory remedy."); *United States v. Temple*, 162 F.3d 279, 286 (4th Cir. 1998) (citing *Aiken* and considering whether there was an appearance of bias only under § 455). In addition, the main State case relied on by Petitioners, *Archer v. State*, 859 A.2d 210 (Md. 2004), had nothing to do with recusal of a judge due to bias, but was concerned with whether due process was violated by a judge forcing a witness to testify. *See id.* at 227.[15] For these reasons, the alleged split is largely, if not completely, illusory.

D. This Case Is Not A Proper Vehicle To Consider The Question

This case is not a proper vehicle to consider whether appearances require recusal under due

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[15] The other cases cited by the Petition in a footnote are not clear support for the proposition that bad appearances require a judge's recusal under federal due process. In *Allen v. Rutledge*, 139 S.W.3d 491 (Ark. 2003), the court held that recusal was mandated because the judge's "comments and rulings indicate[d] that *he was biased*." *Id.* at 498 (emphasis added). In *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003), the court based its decision that recusal was required on Kentucky's Code of Judicial Conduct and the Kentucky Constitution. *See id.* at 835 (holding there was "a violation of Canon 2 of the Code of Judicial Conduct and Section 10 of the Kentucky Constitution"). Finally, while *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989), held that due process mandated recusal due to appearances, the Hawaii Supreme Court subsequently limited this decision, making clear, for example, that "'bad appearances alone do not require disqualification.'" *Hawaii v. Ross*, 974 P.2d 11, 20-21 (Haw. 1999) (quoting *Del Vecchio*, 31 F.3d at 1372)).

process. Even if there is a context in which a constitutional recusal standard based on appearances makes sense, this is not it.

Campaign contributions and expenditures are inherent to elected judiciaries. *See Adair v. Michigan*, 709 N.W.2d 567, 580 (Mich. 2006) ("Indeed, given the premise of our system of judicial selection that there should be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname."). To suggest that this accepted conduct mandates a judge's disqualification because it *appears* bad is to suggest that elected judiciaries themselves are somehow invalid, which is historically and legally inaccurate. *See White*, 536 U.S. at 795 (Kennedy, J., concurring) ("In resolving this case . . . we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence."); *see also Adair*, 709 N.W.2d at 580-81 ("If justices of the Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.").

Furthermore, no court has ever held that the type of campaign expenditures here—made by a non-party, made before the judge was on the bench, made before the case was even at the court, and made years before the relevant decision—are sufficient to trigger recusal even under codes and canons that consider *appearances*. Indeed, Justice Benjamin himself specifically rejected that recusal was required under West Virginia's Judicial Canons, which incorporate an "appearance of impropriety" standard. *See, e.g.*, Pet. Supp. App. 21a n.13. There was no appearance of impropriety, and therefore this is not a case to decide whether due process is implicated by appearances.

Given the lack of a clear split of authority, this Court has recently and often denied certiorari on the question of whether appearances require recusal under due process. *See Guest v. McCann*, 128 S.Ct. 170 (2007); *Jefferson County Racing Ass'n, Inc. v. Barber*, 127 S.Ct. 2975 (2007); *Kettenbach v. Demoulas*, 545 U.S. 1128 (2005); *Johnson v. Carroll*, 544 U.S. 924 (2005). Especially given the vehicle problems, the same result should follow here.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

D. C. OFFUTT, JR.
OFFUTT NORD, PLLC
P. O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV
25728
(304) 529-2868

LEWIS F. POWELL III
Counsel of Record
RYAN A. SHORES
ROBERT W. LOFTIN
HUNTON & WILLIAMS LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for Respondents

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REPLY BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF FOR PETITIONERS

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The infusion of massive amounts of money into state judicial systems through campaign contributions and other expenditures poses a grave threat to state courts' "reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Indeed, the five *amicus* briefs filed in support of the petition by organizations with otherwise divergent institutional goals—as well as the chorus of support from other groups interested in preserving the "legitimacy of the Judicial Branch" (*id.*)—underscore the urgent need for this Court to grant review and to clarify the circumstances in which due process requires the recusal of a judge who has benefited from a litigant's substantial financial support. *See, e.g.*, Am. Bar Ass'n Br. 4; Editorial, *Too Generous*, N.Y. Times, Sept. 7, 2008, at WK8 ("Situations like the Massey Energy case create an unmistakable impression that justice is for sale."); Opinion, *Fairness: Impartial Justice*, Saturday Gazette Mail (Charleston), Aug. 2, 2008, at 4A ("Every court system in the world requires judges to not only be impartial but also avoid the mere appearance of partiality. In Benjamin's situation, the appearance is overwhelming.").

Until Massey filed its brief in opposition, it appeared to agree that "due process is denied by circumstances that create the likelihood or the appearance of bias" (*Peters v. Kiff*, 407 U.S. 493, 502 (1972)) and that the Constitution therefore may "sometimes bar trial by judges who have no actual bias." *In re Murchison*, 349 U.S. 133, 136 (1955). In its motion seeking Justice Starcher's recusal from this case, Massey emphasized that "avoiding the appearance of impropriety is as important in developing public con-

fidence in our judicial system as avoiding impropriety itself" (Mtn. for Disqualification of Justice Starcher 8-9 (internal quotation marks omitted)), and explained that "to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* at 3 (internal quotation marks and alteration omitted). In an effort to evade this Court's review, however, Massey now endorses a significantly narrower conception of due process, arguing that "a judge cannot constitutionally hear a case" *only* where the "judge harbors some form of substantial actual bias." Opp. 15. But no amount of backpedaling on Massey's part can conceal the stark conflict between Justice Benjamin's participation in this case—after receiving more than $3 million in campaign support from Massey's CEO—and the fundamental notions of procedural fairness embodied in the Due Process Clause and this Court's precedent.

Review is warranted to address this conflict and to make clear to lower courts that, in exceptional circumstances such as those presented here, due process prohibits a judge from presiding over the case of a significant financial supporter.

I. JUSTICE BENJAMIN'S PARTICIPATION IN THIS CASE CONFLICTS WITH THE DUE PROCESS DECISIONS OF THIS COURT AND OTHER COURTS.

A. According to Justice Benjamin, "[t]he very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process." Supp. App. 21a n.12. Massey—now that it is no longer seeking the recusal of Justice Starcher in this case—agrees, and attempts (at 29) to dismiss as dicta this Court's unequivocal statement that "due process is denied by circumstances that create the likelihood or the ap-

pearance of bias." *Peters*, 407 U.S. at 502; *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) ("any tribunal . . . not only must be unbiased but also must avoid even the appearance of bias"). Massey's attempt to obscure the conflict between Justice Benjamin's decision to participate in this case and this Court's due process precedent is utterly unsuccessful.

This Court has never required proof of *actual* bias before concluding that due process mandated the recusal of a judge due to circumstances that "might lead him not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), for example, the Court held that due process required the recusal of a judge who had been subjected to repeated verbal abuse by a criminal defendant because "[n]o one so cruelly slandered is *likely* to maintain that calm detachment" necessary for a fair trial. *Id.* at 465 (emphasis added). This "likel[ihood]" of bias was sufficient to require recusal—despite the absence of any evidence that the judge harbored an actual bias against the defendant.

Similarly, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court deemed it unnecessary "to decide whether in fact Justice Embry was influenced" by the close relationship between the issues in the case before him and his own lawsuit against an insurance company. *Id.* at 825. The "*possible* temptation" that these circumstances offered "to the average . . . judge to . . . lead him not to hold the balance nice, clear and true" was enough to require recusal under the Due Process Clause. *Id.* (emphasis added; alterations in original; internal quotation marks omitted).

As this Court has explained, due process requires the recusal of judges laboring under a serious appearance of impropriety because such a strong *appearance* of judicial bias generates a "probability of *actual* bias on the part of the judge . . . [that] is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added); *see also Murchison*, 349 U.S. at 136 ("our system of law has always endeavored to prevent even the probability of unfairness"). Except in the rare case where a judge candidly declares that he is biased against one of the parties appearing before him, it is virtually impossible to prove that a judge is actually biased against a party. Because recusal motions must invariably be filed without the benefit of discovery or an evidentiary hearing, informed inferences drawn from the totality of the publicly available information are generally the only basis for seeking to remove a judge strongly suspected of harboring a bias against one of the parties. The "actual bias" standard endorsed by Justice Benjamin and defended in this Court by Massey would therefore create a nearly insurmountable hurdle for litigants seeking the recusal of a judge who appears to be biased against them. For such parties, the promise of a "fair trial in a fair tribunal" would be illusory indeed. *Id.*

B. Mr. Blankenship, Massey's chairman, CEO, and president, spent $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals. Those staggering expenditures -- which represented more than 60% of the total amount spent supporting Justice Benjamin's campaign—generated an undeniable appearance of impropriety that required Justice Benjamin to recuse himself from Massey's appeal of the $50 million verdict in this case.

None of the *post hoc* rationalizations that Massey offers on behalf of Justice Benjamin—which, as an initial matter, are far better-suited to a brief on the merits than a brief in opposition—can dispel this constitutionally unacceptable appearance of bias. For example, the fact that the campaign expenditures were nominally made by Mr. Blankenship, rather than by Massey, does not remove the due process bar to Justice Benjamin's participation in Massey's appeal. Mr. Blankenship is Massey's chief corporate officer, he personally directed the actions found to be unlawful by the jury and testified at trial about those actions, and his campaign expenditures were widely viewed at the time as having been made on Massey's behalf in an effort to secure the election of a justice sympathetic to the company's interests. *See* William Kistner, *Justice for Sale*, American RadioWorks (2005), *at* http://americanradioworks.publicradio.org/features/judges/ ("many in these parts . . . [said] that Massey was out to buy itself a judge"); Toby Coleman, *Coal Companies Provide Big Campaign Bucks*, Charleston Gazette, Oct. 15, 2004, at 1A. Indeed, because a "corporation acts only through its directors, officers, and agents" (*Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001)), due process would mean little if a corporation could evade the Constitution's requirements by simply contending that the conduct in question was undertaken by one of its individual agents.[1]

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[1] Moreover, Massey had no qualms about equating Justice Starcher's purported bias *against* Mr. Blankenship with a bias against the company itself when seeking Justice Starcher's recusal in this case. *See* Mtn. for Disqualification of Justice Starcher 3 (arguing that recusal was required because Justice Starcher had mounted "vitriolic personal attacks on Mr. Blankenship as CEO and as an individual").

It is similarly irrelevant that the West Virginia Supreme Court issued its 3-2 opinion reversing the verdict in petitioners' favor several years after the election campaign. The $50 million verdict was entered against Massey in August 2002 (Pet. App. 13a), and Mr. Blankenship immediately vowed to appeal the verdict to the West Virginia Supreme Court (the only appellate court in the State). Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 5. The case was thus inevitably heading on appeal to the state supreme court at the time that Mr. Blankenship was pouring money into the 2004 election campaign on behalf of Justice Benjamin. This timing was not lost on observers. *See* Kistner, *supra* (Massey "happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court" at the time of Mr. Blankenship's campaign expenditures).

Nor is the appearance of impropriety generated by Mr. Blankenship's staggering campaign expenditures ameliorated by the fact that most of this support was provided either through contributions to a 527 organization or through independent expenditures, such as payments to media outlets. Regardless of the precise procedures through which the funds were channeled, Mr. Blankenship unquestionably provided those funds to support Justice Benjamin's candidacy for a seat on the state supreme court and to improve his chances of prevailing in his highly competitive contest with the incumbent justice. Justice Benjamin's victory in that election—by a slim margin of 53% to 47%—was doubtless attributable in no small part to the hours of television advertising and pages of favorable newspaper copy financed by Mr. Blankenship's expenditures. Under the circumstances, Justice Benjamin could not help

but feel a debt of gratitude to his principal financial supporter. His decision to participate in this case while laboring under this unavoidable "temptation" to tip the "balance" in Massey's favor is flatly at odds with this Court's due process jurisprudence. *Lavoie*, 475 U.S. at 825.[2]

C. That decision—premised on Justice Benjamin's uncompromising position that "appearances . . . should never alone serve as the basis for a due process challenge" (Supp. App. 23a n.14)—also conflicts with the decisions of a number of state and federal courts recognizing that "[d]ue process requires not only that a judge be fair, but that he also appear to be fair." *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) (citation omitted); *see also* Pet. 22 & n.6 (citing cases). Justice Benjamin is not alone, however, in endorsing a restrictive notion of due process that requires recusal only where there is proof that a judge is actually biased against a litigant. Several state and federal courts have expressly adopted a similarly narrow view of the protections afforded by the Due Process Clause. *See, e.g., State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) ("a judge's failure to disqualify himself or herself will implicate the due

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[2] The constitutional shortcomings inherent in Justice Benjamin's insistence on participating in this case are not obviated by the fact that he has voted against Massey in *other* cases. Unlike here, in none of those cases was Justice Benjamin's vote outcome-determinative. In any event, it cannot be said that petitioners were afforded their constitutional right to a hearing before a "neutral and detached judge" (*Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972)) simply because, in other cases, Justice Benjamin may not have acted on his bias in favor of Massey. It is cold comfort to a party compelled to appear before a judge laboring under a substantial appearance of bias that the judge does not *always* allow that bias to sway his vote.

process clause only when the right to disqualification arises from *actual bias* on the part of that judge") (emphasis in original); *see also* Pet. 22-23 & n.7 (citing cases). This Court's review is warranted to provide authoritative guidance on this important and frequently recurring issue.

Tellingly, Massey nowhere denies the existence of this conflict. Opp. 31. Massey instead directs most of its effort to attempting to distinguish the holding of the Supreme Court of Oklahoma that federal due process required a judge to recuse himself where an attorney for one of the parties had donated to his campaign and solicited others to make contributions. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). While Massey is correct that the contributions in *Pierce* were made while the suit was pending before the recipient judge, the timing of the contributions does not meaningfully distinguish the holding in *Pierce* from the facts of this case because the Oklahoma Supreme Court's decision did not rest upon the contributions' timing. The decision was instead premised on the court's conclusion that "[d]ue process 'preserves both the *appearance* and reality of fairness,'" and that the totality of the circumstances associated with the attorney's support for the judge's campaign created a constitutionally unacceptable appearance of unfairness. *Id.* at 798 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)) (emphasis added). Notwithstanding Massey's factual quibbles with the *Pierce* decision, the fact remains that Justice Benjamin emphatically rejected the possibility that due process would *ever* require recusal based on an appearance of unfairness. Supp. App. 21a n.12. The conflict between these two fundamentally irreconcilable understandings of due process reinforces the urgent need for this Court's review.

II. This Case Is An Ideal Vehicle For Addressing A Question Of Exceptional Importance To The Legitimacy Of State Courts.

Massey contends that this case is not an appropriate vehicle for clarifying the circumstances in which due process requires the recusal of a judge who has benefited from a litigant's substantial financial support. In reality, this closely watched case provides the court with the perfect opportunity to address this vitally important issue.

Massey accuses petitioners of failing to "offer the Court a workable constitutional standard for when recusal will be constitutionally required." Opp. 13. Of course, the articulation of a specific "constitutional standard" is generally best left for a brief on the merits, rather than a petition for a writ of certiorari. In any event, the facts of this extraordinary case afford the Court an ideal opportunity to articulate the factors that lower courts should consider when weighing a motion for recusal based upon a litigant's financial support for a judge. Wherever the precise constitutional line lies, there can be little doubt that the facts of this case fall beyond that line: Mr. Blankenship expended more than $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals—which represented more than 60% of the total amount spent in support of the campaign—and solicited other donors to give money to the campaign while preparing to appeal a $50 million verdict to that court. Clarifying that these facts create a constitutionally intolerable appearance of impropriety would provide lower courts with substantial guidance in deciding future recusal motions.

It may well be difficult to draw a bright line identifying with absolute precision every case where due process requires the recusal of a judge who has benefited from a litigant's campaign expenditures. But this is equally true of other areas of constitutional law. The fact that it may be difficult to articulate precisely when the government has overstepped the bounds of the First and Fourth Amendments, for example, has not dissuaded the Court from granting certiorari in such cases in order to provide meaningful guidance to lower courts.

Indeed, "in our system of adjudication, principles seldom can be settled on the basis of one or two cases, but require a closer working out." *Am. Airlines v. Wolens*, 513 U.S. 219, 234-35 (1995) (internal quotation marks omitted). This is especially true for matters of due process, as it is frequently impossible for this Court to anticipate all of the factual permutations with which lower courts may be confronted and to draw a definitive line between the constitutionally permissible and the constitutionally infirm. In traditional common-law fashion, however, this Court has repeatedly granted review of procedural due process cases—and recusal cases, in particular—to provide lower courts with authoritative examples against which to measure future cases. *See Murchison*, 349 U.S. 133; *Mayberry*, 400 U.S. 455; *Ward*, 409 U.S. 57; *Lavoie*, 475 U.S. 813.

This Court should do so again here in order to preserve the "legitimacy of the Judicial Branch" in the face of increasingly pervasive campaign contributions from interested parties. *Mistretta*, 488 U.S. at 407. Although the election of state court judges does not, standing alone, raise any constitutional concerns, there are certain exceptional cases where the campaign expenditures supporting a judge are so

large and so ill-timed that they generate a constitutionally unacceptable appearance of impropriety. This is one of those cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

MASSEY COAL COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN
ROBERT D. CARROLL

WILLIAM H. NEUKOM
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, Il 60610
(312) 988-5000

Counsel for Amicus Curiae
American Bar Association

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INTEREST OF THE AMICUS[1]

Amicus curiae American Bar Association ("ABA") respectfully submits this brief in support of the petition for writ of certiorari. Having examined judicial impartiality issues and contributed to the fields of legal and judicial ethics for over one hundred years, the ABA believes that the facts and circumstances of this case demonstrate the need for guidance from this Court as to applicable constraints imposed by the Due Process Clause of the Fourteenth Amendment to the Constitution upon judicial recusal determinations where a party has contributed significantly to the judge's election campaign.

With approximately 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. ABA members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its voluntary membership includes lawyers in private practice, government service, corporate law departments, and public interest and other nonprofit organizations, as

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters or e-mails on file with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief.

well as legislators, judges, law professors, law students, and non-lawyer associates in related fields.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law."[3] One of its goals is "[t]o preserve the independence of the legal profession and the judiciary as fundamental to a free society."[4] In furtherance of its mission and this goal, the ABA has devoted extensive research and effort to addressing aspects of judicial elections that threaten or appear to threaten the integrity, impartiality, and independence of the judiciary. This work serves the critical functions of promoting the rule of law, the separation of powers, public confidence in the judiciary, and the ability of state courts to guarantee due process of law to all litigants before them.

The instant case presents questions that implicate long-standing codes of ethics developed and adopted by the ABA over the past 100 years. In particular, it raises important issues regarding the extent to which

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] *Id.*

judicial officers should recuse themselves from cases involving substantial contributors to their judicial campaigns when failure to do so could reasonably compromise public confidence in the impartiality and integrity of the Courts.

The ABA's 1908 Canons of Professional Ethics recognized the profession's obligation to "protect against appointment or election" to the bench of those who would not forgo "other employments, whether of business, political, or other character, which may embarrass their free and fair consideration of questions before them for decision."[5] The ABA's first Canons of Judicial Ethics, adopted in 1924, were replaced by the Code of Judicial Conduct in 1972. This, in turn, became the Model Code of Judicial Conduct (the "Model Code") in 1990, which underwent substantial revisions in 1997, 1999, 2003, and 2007.

Canon 1 of the Model Code states, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Canon 2 states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." Under Canon 2, Rule 2.11 deals specifically with disqualification, stating at 2.11(A), "A judge shall disqualify himself or herself in any

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[5] CANONS OF PROF'L ETHICS Canon 2 (1908). *See also id.*, Canon 3 ("A lawyer deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor.").

proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances." Among those circumstances, 2.11(A)(4) concerns the judge's receipt of campaign contributions.[6] Both the Model Code in general and Rule 2.11(A) in particular have become templates from which individual states have enacted their own judicial codes and disqualification rules.[7]

In addition to developing the Model Code, the ABA actively promotes public understanding of, and respect for, the judiciary through various initiatives. In 2007, the ABA's Standing Committee on Judicial Independence inaugurated a Judicial Disqualification Project, which has researched disqualification rules around the country; the forthcoming final report will include a discussion of concerns regarding judicial proceedings involving large campaign donors, which may be of value to the Court in its consideration of this matter should review be granted in this case.

SUMMARY OF ARGUMENT

Public confidence in the fairness and impartiality of the judicial process is essential to the efficacy and legitimacy of the courts and the judiciary. Even the appearance of judicial impropriety can undermine that confidence, as both the Model Code and this

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[6] *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/approved_MCJC.html.

[7] *See* ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, State Judicial Ethics Resources, *available at* http://www.abanet.org/judicialethics/resources/resources_state.html.

Court's jurisprudence under the Due Process Clause of the Fourteenth Amendment have recognized. The ABA submits that such an appearance of impropriety may be created where, as in the present case, a judicial officer denies a recusal motion and continues to sit on a case where one of the parties has made significant contributions to the judge's election campaign. With the cost of judicial campaigns increasing, these issues are arising throughout the country, and there is need for guidance from the Court as to the boundaries imposed by the Due Process Clause in these circumstances.

REASONS FOR GRANTING THE WRIT

This case presents an important and unresolved question regarding an issue of increasing concern in courts across this country – namely, whether the constitutional right to due process places limits upon a judge's consideration of a legal matter in which one party was a substantial contributor to that judge's election to the bench.[8] Here, the Chairman and CEO of Respondent Massey, one of the nation's largest coal companies, which had lost a $50 million fraud verdict to Petitioners, contributed (both directly and indirectly) $3 million supporting the 2004 campaign of Justice Brent D. Benjamin for a seat on the

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[8] Motions to disqualify on grounds of campaign contributions "hardly ever succeed." John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000); *see also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 26.6 at 776 (2d ed. 2007) (the argument for disqualification "has repeatedly been rejected by appellate courts").

Supreme Court of Appeals of West Virginia.[9] These campaign contributions, representing more than 60% of the total money spent on Justice Benjamin's campaign, were made at the very time Massey was preparing to appeal that verdict. After an initial decision was vacated for another judge's failure to recuse, the fraud verdict was ultimately overturned in a 3-2 decision, with Justice Benjamin casting the deciding vote after refusing to recuse himself. In light of the frequency with which such situations arise, and in light of language in past decisions of this Court, the ABA respectfully submits that state courts at all levels need guidance from this Court on the boundaries imposed by the Due Process Clause.

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[9] Some press accounts have reported higher amounts for the contribution. *See, e.g.*, Potpourri, CHARLESTON GAZETTE (WV), July 7, 2008, at 4A ("Massey Energy's president spent $3.5 million for "attack ads" that enabled . . . Benjamin to win a seat on the state supreme court. . . ."); Justin D. Anderson, *Court Race Ad Sparks Controversy; French Riviera Photos Resurface in Campaign Spot*, CHARLESTON GAZETTE (WV), May 5, 2008, at 1A ("[Massey CEO] Blankenship spent about $3.5 million for advertisements, helping to get Justice Brent Benjamin elected"); Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash "in the Courtroom,"* N.Y. TIMES, Apr. 15, 2008, at A22 (reporting that Benjamin, who cast the deciding vote, declined to recuse himself despite owing his election to "more than $3 million" spent by Blankenship). Amicus, however, will not separately recite the facts of this case but will rely on the statement of facts in the Petition.

A. Substantial Judicial Campaign Contributions May Create An Appearance Of Bias And Undermine The Legitimacy Of The Judicial System.

This Court has recognized in a variety of contexts that the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law. *See, e.g., Alden v. Maine*, 527 U.S. 706, 752 (1999) (a state court's "legitimacy derives from fidelity to the law"); *United States v. Mistretta*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("public confidence [is] essential" to the judicial branch) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). That public confidence is being eroded by activities such as those at issue in this case and in other cases like it.[10]

Large campaign expenditures have become a virtual prerequisite for election to state judicial office. To meet this demand, judicial candidates increasingly depend on large contributors.[11] These elections are

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[10] The most recent is *Dupre v. Telxon Corp., petition for cert. filed*, No. 08-41 (U.S. July 7, 2008).

[11] This phenomenon is not limited to state high court elections. Candidate fundraising is also on the rise in elections for trial and intermediate appellate judgeships. For example, two candidates running for an Illinois intermediate appellate court judgeship in 2006 quadrupled the previous state record by raising a combined $3.3 million. *See* JUSTICE AT STAKE

no longer "low key affairs, conducted with civility and dignity," *see* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002) (quotation omitted), but involve highly reported,[12] politicized campaigns marked by million-dollar budgets and heated competition. This massive influx of money may pose a threat of judicial impropriety, both actual and apparent.

A substantial majority of the public – often 80% or higher – believes that campaign contributions influence judicial decisions, according to a variety of surveys conducted at both the national[13] and the

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CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 at 24, *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf. Fundraising records will continue to be broken as more interest groups do the same mental calculus candidly acknowledged by an Ohio AFL-CIO official: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. ST. B. J. 19, 20 (Winter 2002).

[12] Intense contemporary state and local media attention accompanied the judicial disqualification determination below, signaling public concern for the appearance of impropriety presented in this case.

[13] Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Courts: Judicial Survey Results* (2007), *available at* http://www.appcpenn.org/Downloads/20071017_JudicialSurvey_Survey_Questions_10-17 2007.pdf/ (finding that 69% of the public "thinks that raising money for elections affects a judge's rulings to a moderate or great extent"); Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and*

state[14] level. Tellingly, many state court judges feel the same way: A 2002 national survey of elected

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Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges (2007), *available at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions").

[14] **Texas:** Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) (finding that 83% of Texans believe money has an impact on judicial decisions); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm (finding Texas Supreme Court 750% more likely to grant discretionary petitions for review filed by contributors of at least $100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of $250,000 or more).

Pennsylvania: Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) (finding that 90% of voters believe judicial decisions were influenced by large campaign contributions); *see also* Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 (noting that statistic).

Ohio: T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90% of respondents believed campaign contributions influenced judicial decisions). *See also* Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (finding that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or

state judges showed that 26% of them believe campaign contributions have at least *some* influence on judge's decisions, and another 9% believe such contributions have a *great deal* of influence.[15]

In short, the growing role of private money in judicial elections has created the perception that, in state courts, "large donors call the tune." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 144 (2003) (quotation omitted). Granting the writ here will give this Court a timely opportunity to clarify the boundaries imposed upon judicial disqualification decisions in such circumstances by the Fourteenth Amendment's guarantee of due process.

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from groups that filed supporting briefs," and "voted in favor of contributors 70 percent of the time."

Louisiana: Vernon Valentine Palmer, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (showing striking statistical bias toward contributors by state supreme court justices over 14-year period).

[15] Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire* (2001-2002) 5, *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf.

B. This Case Presents The Court With An Opportunity To Clarify What Due Process Requires Of Disqualification Determinations In Judicial Campaign Contribution Cases.

The ABA recognizes that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). "[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Nonetheless, this Court has consistently required disqualification when judicial conduct has fallen below the constitutional floor.[16]

The ABA respectfully submits that this case affords the Court an important opportunity to clarify whether this due process constitutional floor applies to cases involving judicial campaign contributions. The magnitude and timing of the campaign contributions here gave Justice Benjamin, in

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[16] *See Tumey v. Ohio*, 273 U.S. 510 (1927) (judge's assessment of civil fines went into his pocket); *In re Murchison*, 349 U.S. 133 (1955) (judge who presided over a "one-man grand jury" also presided over contempt proceedings related thereto); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge reviled by defendant also presided over his contempt trial); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor's adjudication of traffic fines contributed to city finances); *Aetna*, *supra* (judge voting for novel state cause of action against insurer had similar claim against an insurance company pending in a lower court).

appearance if not in fact, a personal interest in the outcome of this case similar to those this Court deemed to require recusal in *Tumey* and *Murchison*. Here as well the "situation is one 'which would offer a possible temptation . . . not to hold the balance nice, clear and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). Indeed, Justice Benjamin's interest seems to have been "'direct, personal, substantial, [and] pecuniary.'" *Id.* (quoting *Tumey*, 273 U.S. at 523). If the facts of this case do not implicate due process concerns, then few judicial contribution cases ever will.

The ABA submits that the facts of this case would require judicial disqualification under the current version of the ABA's Model Code. The Model Code focuses as much on the appearance of bias as on actual bias. Canon 1 provides, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[17] The conduct here – accepting contributions of this magnitude from a

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[17] *See also* MODEL CODE, Canon 1, Rule 1.2, cmt [5] ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.").

litigant and refusing to recuse – certainly creates an appearance of impropriety.

The Model Code's general disqualification provisions fall under Canon 2, which states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." Under this Canon, Rule 2.11(A) states that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances." Rule 2.11(A) then lists specific circumstances in which the need for disqualification is presumed, including one added in 1999[18] that requires disqualification when the judge has received election campaign contributions over a certain limit (to be set by the individual states) from parties or lawyers involved in a case. *Id.* Rule 2.11(A)(4).[19]

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[18] West Virginia, however, appears still to be operating under the 1990 version of the Model Code. *See* W. VA. CODE OF JUDICIAL CONDUCT, *available at* http://www.state.wv.us/wvsca/JIC/codejc.htm.

[19] Rule 2.11(A)(4) requires disqualification when "[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]."

To date, only two states have adopted this approach.[20] To be sure, there are First Amendment implications in prescribing limits on campaign contributions[21] – concerns that have been heightened by the uncertainties that have arisen in the aftermath of this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).[22] The ABA submits that such concerns also heighten the need for guidance from this Court as to whether the Due Process Clause requires recusal in these circumstances.

The Court need not, however, prescribe any precise dollar campaign contribution amount as the constitutional floor to conclude that due process limitations apply on these facts. Nor need the Court determine whether Justice Benjamin was actually

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[20] *See* ALA. CODE §§ 12-24-1, 2; MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2).

[21] An alternative to mandating disqualification dollar amounts for very large private sector contributions is to deter them by providing for public campaign financing of judicial elections, though this approach also must overcome First Amendment hurdles. *See, e.g., N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008).

[22] *Compare Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) *with In re Dunleavy*, 838 A.2d 338 (Me. 2003), *cert. denied sub nom. Dunleavy v. Maine Comm. on Jud'l Responsibility*, 541 U.S. 960 (2004), *and Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004) (on remand, affirming district court on partisan activities clause and solicitation clause), *vacated & reh'g granted*, 2004 U.S. App. LEXIS 10232 (8th Cir. 2004), *rev'd*, 416 F.3d 738 (8th Cir. 2005) (en banc).

biased, just as the Court was "not required to decide whether in fact Justice Embry was influenced" in *Aetna*: "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias' . . . . But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" 475 U.S. at 824 (quoting *Murchison*, 349 U.S. at 136). Accordingly, the *Aetna* Court vacated the decision in which Justice Embry had cast the deciding vote, 475 U.S. at 828, just as Justice Benjamin did here.

Judicial elections and judicial campaign contributions in the normal course do not violate due process. However, implicit in the Model Code's Rule 2.11(A)(4) is that, at *some* contribution level, fundamental fairness concerns of actual or apparent bias are triggered.[23] Because the Court has held that the appearance, as well as the reality, of judicial impartiality animates the Due Process Clause, the ABA submits that this case presents an important opportunity for the Court to clarify the constitutional boundaries that govern the significant and recurring issue of judicial campaign contributions.

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[23] *See also*, ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003), *available at* http://www/abanet.org/barserv/library/n/judiciary_and_the_courts/4543.pdf ("Appearances matter because the public's perception of how the courts are performing affects the extent of its confidence in the judicial system. . . . [P]ublic confidence in our judicial system is an end in itself.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN
ROBERT D. CARROLL

WILLIAM H. NEUKOM
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, Il 60610
(312) 988-5000

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE CAMPAIGN LEGAL CENTER, AND THE REFORM INSTITUTE IN SUPPORT OF PETITIONERS

AZIZ HUQ
Counsel of Record
JAMES SAMPLE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Petitioners is filed on behalf of three nonprofit, nonpartisan organizations: The Brennan Center for Justice at New York University School of Law, The Campaign Legal Center, and The Reform Institute.

The Brennan Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through empirical research, counseling, and advocacy, the Brennan Center works to protect the judiciary from politicizing forces, including the undue influence of money. The Brennan Center favors neither judicial appointments nor judicial elections, but rather strives to promote fair courts regardless of selection mechanism.

The Campaign Legal Center, Inc. ("CLC") works in the areas of campaign finance, voting rights, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's campaign finance and election

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* contributed monetarily to the preparation of this brief. The parties have consented to the filing of this brief. Petitioners filed a letter of consent to all *amicus* briefs with the Clerk of the Court. Written consent from Respondents has been filed with the Clerk of the Court along with this brief.

laws are enforced. CLC also works to support prompt and rigorous enforcement of government ethics rules.

The Reform Institute brings together business leaders and policy experts, as well as retired and current elected officials to work to restore integrity and effectiveness to our government and the electoral process. The Institute is a nonpartisan educational organization working to strengthen the foundations of our democracy and build a resilient society. The Institute formulates and advocates valuable, solutions-based reform in vital areas of public policy. The Institute believes that surmounting the most intractable issues facing the nation will require fundamental reform that results in a government that inspires and instills public confidence through transparency and accountability, leadership that serves as a catalyst for innovation and collaboration, and policies that promote competition in elections and the markets. Since its founding in 2001, the Institute has supported reforms that protect the integrity of the electoral process, promote a more informed electorate, encourage greater competition, empower citizens, reduce the influence of special interests, and ensure effective enforcement and administrative support.

Amici share a concern that the injection of massive sums of money into judicial campaigns by litigants and lawyers, can, in certain circumstances, threaten the integrity, impartiality, and independence of the courts, and thereby deprive the litigants appearing before those courts of due process of law. *Amici* believe that the time is ripe for this Court to

provide litigants, lawyers, and judges nationwide with guidance regarding the role of recusal under the Due Process Clause of the Fourteenth Amendment and therefore file this brief in support of the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case is an exceptional instance of a broader national trend. It concerns the affront to due process when: (1) a litigant faces a $50 million judgment in a contract dispute between mining companies; (2) a sole individual, the litigant's CEO, spends more than three million dollars to help elect a judge – more than all other expenditures in support of the judge *combined*; (3) the judge, after his election, refuses to recuse himself from the litigant's appeal; and (4) the same judge casts a deciding vote reversing the judgment against the litigant. The facts of this case are egregious, but the underlying questions about due process are raised in an increasing number of cases nationally. This case provides the Court with a clean vehicle to address an important constitutional issue and to prevent the facts of this case from becoming harbingers of a new and disturbing norm.

The last decade has seen an explosion in campaign expenditures in judicial elections. Lawyers and litigants, unsurprisingly, are the principal sources of funds. Increasingly, as retired Supreme Court Justice Sandra Day O'Connor has observed,

such contributions "threaten the integrity of judicial selection and compromise the public perception of judicial decisions." Sandra Day O'Connor, Op-Ed, *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25.

State court judges, lawyers and litigants need this Court's guidance as to when due process requires recusal to prevent the perception (or reality) that enormous campaign expenditures can be made to cause a favorable outcome in a specific pending case. The startling facts of this case demonstrate as much.

If the Court does not intervene in this, a bellwether case closely watched across the country, litigants, lawyers, and judges will draw the lesson that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases. The resulting race to the bottom will exacerbate the present variability in enforcement of the general disqualification standard, severely corroding both the quality and perception of American justice.[2] If the Supreme Court steps in now, however, the communicative impact of a reversal and remand would be substantial. Judges, litigants and lawyers would understand that disqualification standards

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[2] As explained in Part II.B of this brief, forty-seven states, including West Virginia, have adopted the American Bar Association's standard that: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." ABA Model Code of Judicial Conduct Canon 2 R. 2.11 (2007) (formerly Canon 3E(1)); *see infra* Part II.B.

must be taken seriously. The Court would thereby thwart – or at least mitigate – a damaging national trend.

In 2002, Justice Kennedy made clear that states "may adopt recusal standards more rigorous than due process requires." *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring). Justice Kennedy's statement appropriately invites states to consider measures that ensure due process "plus." This case, however, illustrates the urgent need for guidance as to the floor of due process *simpliciter* – the point at which the facts are so egregious as to cross over "the outer boundaries of judicial qualification" such that the Due Process Clause of the Fourteenth Amendment requires recusal. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

ARGUMENT

I. CHANGES IN THE FINANCING OF JUDICIAL ELECTION CAMPAIGNS CREATE NEW THREATS TO DUE PROCESS.

The mere fact that judges on state courts across the United States are elected does not, in and of itself, implicate due process concerns. But massive campaign expenditures by litigants and lawyers before the court, combined with particularized circumstances such as those present in this case, implicate fundamental fairness concerns. No litigant standing in the shoes of the Petitioners in this case

would believe that they received the *sine qua non* of due process: a fair hearing before an impartial arbiter.

The circumstances and sums of the expenditures by the Respondent's CEO constitute an egregious example of a growing trend. Increasingly, litigants and lawyers, sometimes with specific pending cases before the bench, are the principal sources of campaign money in judicial elections. In turn, variable underenforcement of the objective component of the general disqualification standard, as illustrated by Justice Benjamin, yields the appearance, and perhaps the reality, of bias. This case offers the Court a unique, clean vehicle to mitigate the most pernicious effects of this worsening trend.

A. Judicial Election Expenditures Have Dramatically Increased In The Last Decade.

The trend towards high levels of judicial campaign expenditures began in the late 1990s. The amount of money raised by judicial candidates has escalated dramatically since then. In the past four election cycles (2000-2006), judicial candidates raised $157 million, nearly double the amount raised in the four preceding election cycles (1992-1998). James Sample et al., *The New Politics of Judicial Elections 2006* 15 (Justice At Stake 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf [hereinafter *New Politics 2006*]. In the

2005-2006 election cycle, 50 percent of states that held entirely privately-financed, contested supreme court elections (5 of 10) broke state fundraising records; the median amount raised by supreme court candidates also increased 20 percent from 2004. *Id.*

Wisconsin, Illinois, and Alabama offer illustrative snapshots of the trend:

- Less than two months after being disciplined by the Wisconsin Supreme Court for ruling, while a lower court judge, on eleven cases involving a bank for which her husband served as a director, Justice Annette Ziegler authored a 4-3 decision in favor of the position advocated by a group that spent over $2 million supporting her 2007 election. The group had "long considered the case a top priority." Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, Milwaukee J. Sentinel (Wis.), July 14, 2008, at A6. This year, Wisconsin surpassed the expenditure records set in Justice Ziegler's 2007 race. Interest groups ranging from trial lawyer and corporate organizations to tax opponents and teachers' unions combined to make Wisconsin's April 1, 2008 supreme court contest the most expensive judicial race in state history. Press Release, Wisconsin Democracy Campaign, *Nasty Supreme Court Race Cost Record $6 Million: Candidates Were Outspent $4 to $1 by Outside Special Interests* (July 22, 2008), *available at* http://wisdc.org/pr072208.php. Reflecting on the developing state of affairs just one week after that contest, retired Supreme Court Justice Sandra Day O'Connor opened a conference by declaring, "We put

cash in the courtrooms, and it's just wrong." Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22.

- In a 2004 race for a seat on the Illinois Supreme Court, which is elected by district rather than statewide, two candidates raised more than $9.3 million combined, a figure that outpaced candidates in eighteen U.S. Senate races that year, and that was nearly double the previous national record for a judicial election. Deborah Goldberg et al., *The New Politics of Judicial Elections 2004* 14-15, 32 (Justice At Stake 2005), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf. The winner of the election, then-trial judge Lloyd Karmeier, reflected on the six-figure checks that poured into both campaigns – including from competing sides in a then-pending appeal – saying: "That's obscene for a judicial race. What does it gain the people? How can people have faith in the system?" *Id.* at 19.

- Since 1993, Alabama Supreme Court candidates have raised in aggregate more than $54 million. *New Politics 2006*, at 15. In the 2005-2006 election cycle alone, judicial candidates in Alabama raised $13.4 million, surpassing the previous state record by more than a million dollars. *Id.* The three candidates for chief justice raised a combined $8.2 million, making it the most expensive judicial race in state history and the second most expensive judicial campaign in American history. *Id.* at 15, 26.

Unsurprisingly, the judicial candidate with the most funds in a race generally wins the election. In 2006, the candidate who raised more money in state high court races won 68 percent of the time. In 2004, that figure was 85 percent. *New Politics 2006,* at vii. This dynamic poses a particularly nettlesome dilemma for judicial candidates, above and beyond the problems faced by other electoral candidates, due to the likely source of such funds: present and prospective litigants and counsel before the relevant courts. Former West Virginia Supreme Court Justice Richard Neely summarized the dilemma: "It's an absolute disaster for the judiciary. . . . Now every seat on the Supreme Court is for sale. . . . Judges will be required to dance with the one that brung them. . . . When someone like Don Blankenship offers you $3 million, you can't turn it down." Brad McElhinny, *Next Court Race Could Be Just as Nasty*, Charleston Daily Mail (W. Va.), Nov. 4, 2004, at 1A.

B. Massive Contributions From Present Or Prospective Litigants And Their Lawyers Threaten Judicial Independence And Due Process.

Increased campaign expenditures in judicial elections elicit public concern, but do not, by themselves, rise to the level of a constitutional issue. Rather, the immediate constitutional concern involves campaign expenditures made in large amounts and under circumstances where an ordinary person would

conclude that they were made with the aim of securing a favorable outcome in a specific case in which the contributor is a litigant or has some other substantial pecuniary interest.

Research by the National Institute on Money in State Politics identified and disaggregated 84 percent of directly contributed funds raised in 2005-2006 state high court elections by interest group sector. Business interests represented the largest source of contributions, accounting for 44 percent of all contributed funds. Lawyers constituted the second largest source of contributions, accounting for 21 percent of all contributed funds. *New Politics 2006,* at 18, fig. 11.

The proportion of contributions to judicial candidates by lawyers and businesses may be partly explained by the belief among contributors that contributions will affect the outcome of cases in which they are involved. For example, in a study by the Texas State Bar and Texas Supreme Court, 79 percent of attorneys surveyed indicated their belief that campaign contributions have a significant influence on a judge's decision. Alexander Wohl, *Justice for Rent*, The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent.

The perception that campaign contributions buy influence on the bench in pending or imminent cases is so strong that litigants and lawyers give even when their candidate cannot lose: A recent *Los Angeles*

Times study found that even Nevada judges running *unopposed* collected hundreds of thousands of campaign dollars from litigants and lawyers, frequently "within days of when a judge took action in the contributor's case." Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. Times, June 8, 2006, at A1.

The perception among contributing litigants and counsel is shared by their non-contributing counterparts. In a 2006 *amicus* brief urging this Court to accept certiorari in *Dimick v. Republican Party of Minnesota*, thirty-nine large national corporations stated: "*Amici* often have reasons for concern about – and many of them have had at least one experience of – receiving what appears to be less than fair and impartial justice in jurisdictions where they . . . have not contributed to . . . judicial candidates." Brief of *Amicus Curiae* Concerned Corps. in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102. As that brief suggested, potential donors may feel locked into a dynamic in which they have to give, regardless of whether they actually favor the recipient, thanks to the sheer prevalence, and perceived influence, of contributions.

Disturbingly, perceptions of improper influence are supported by findings of strong correlations between contributions and litigation outcomes. A 2001 report on the Texas Supreme Court revealed that the average petitioner who gave the court $250,000 or more was 10 times more likely than the

average non-contributor to have a petition for discretionary review granted. The average petitioner who gave the court $100,000 or more was 7.5 times more likely than the average non-contributor to have a petition accepted. And the report found that "across the board, the more a petitioner gave, the greater the likelihood that the court would accept a given petition." Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

A 2006 *New York Times* study by Adam Liptak and Janet Roberts augmented these earlier findings via a groundbreaking review of twelve years of Ohio Supreme Court decisions. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1 [hereinafter Liptak & Roberts]. The study found that Ohio justices routinely sat on cases after receiving campaign contributions from the parties involved, and that they then voted in favor of those contributors 70 percent of the time. *Id.* One justice, Terrence O'Donnell, voted in favor of his contributors 91 percent of the time. *Id.*

This year, a study of the Louisiana Supreme Court went a step further by controlling for the baseline decisional tendencies of individual judges in cases involving non-contributors. The authors of the study concluded that "judicial voting favors plaintiffs' or defendants' positions not on the basis of judicial leaning or philosophical orientation but on the basis of the size and timing of a political donation." The

study further found that the "higher the donation, the higher the odds that the contributor's position will prevail."[3]

Evidence of correlation is often the strongest evidence available of the causal connection between contributions and altered outcomes. In any given instance, direct evidence of influence is unsurprisingly unavailable because neither judges nor litigants readily admit to a quid pro quo. Moreover, research on social psychology shows that much bias is unconscious and that people therefore tend to underestimate and undercorrect for their own biases and conflicts of interest.[4] Even frank self-reporting would

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[3] Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291, 1291 (2008). This study, however, has recently been the subject of methodological and empirical criticisms. *See* Robert Newman et al., *A Critique of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function"* 1, 2 (2008), http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf (criticizing the study for failing to address whether expected voting behavior influences contributions, as well as whether contributions influence voting behavior); E. Phelps Gay & Kevin R. Tully, *Rebuttal of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function"* 1, 10 (2008), http://www.lasc.org/press_room/press_releases/2008/Rebuttal_June_12.pdf (noting errors in the data).

[4] *See, e.g.*, James Sample et al., *Fair Courts: Setting Recusal Standards* 20 (Brennan Center for Justice 2008), *available at* http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf

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therefore yield an underestimate of influence. But as Ohio Justice Paul E. Pfeifer has explained: "Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say." Liptak & Roberts.

Beyond the risk of an actual quid pro quo, cash from litigants also has an inevitably corrosive effect on public confidence in America's courts. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 public poll. Justice at Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf. These results echo a 2001 nationwide poll, in which 76 percent of those surveyed stated their belief that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf. In that 2001 survey, 79 percent of the registered

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[hereinafter *Fair Courts*] (summarizing studies); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier To Recognizing Conflicts of Interest*, *in* Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy 74 (Don A. Moore et al. eds., 2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781 (2004); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1248-50 (2002).

voters polled indicated their belief that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 10. These statistics illustrate that the public intuitively knows what constitutional theorists strive to prove: judicial independence matters, and the best indicator of whether courts are fair, in a world that too often lacks direct evidence of improper influence, is the appearance – or not – of bias.

This case in particular has had a direct and substantial impact on the public perception of judicial independence in West Virginia. A 2008 study by Talmey-Drake Research and Strategy found that over 67 percent of West Virginians doubted that Justice Benjamin would be fair and impartial in considering this case. Only 15 percent of adult West Virginians believed that Justice Benjamin *could* be fair and impartial. Second Renewed Joint Mot. for Disqualification of Justice Benjamin at 3.[5]

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[5] This sentiment was amply echoed in public forums such as editorial and letters pages. *See, e.g.*, Allan N. Karlin & John Cooper, Op-Ed, *Perception that Justice Can Be Bought Harms the Judiciary*, The Sunday Gazette Mail (W. Va.), Mar. 3, 2008, at 3C ("Nor is it surprising that West Virginians . . . 'reasonably question' Benjamin's ability to impartially sit on cases involving Blankenship's companies."); Editorial, *Benjamin Shows Need for Judicial Selection Reform*, Huntington Herald-Dispatch (W. Va.), Sept. 24, 2005, at 4A. ("Benjamin's case is more extreme than others, but the same concern applies to all."); Cecil E. Roberts, Op-Ed, *Blankenship's Hollow Rhetoric: His Money Defeated*

(Continued on following page)

Members of the bench share the public's concern about the influence – perceived and at least occasionally real – of political contributions on the judicial process. In a written survey of 2,428 state lower, appellate, and supreme court judges, almost half (46 percent) of the judges surveyed indicated their belief that campaign contributions to judges influence decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake State Judges Frequency Questionnaire* 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. And more than 70 percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. As a result, more than 55 percent of state court judges believe that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

It is certainly logical to presume that these overwhelmingly consistent perceptions of contributors, non-contributors, members of the public, and

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McGraw, The Charleston Gazette (W. Va.), Dec. 13, 2004, at P5A ("Give us a break, Don . . . The real reason you bought the state Supreme Court seat is because Massey will soon stand before that court to try to rid itself of a $50 million jury penalty for putting . . . Harman Mining, out of business."); Eddie Tucker, Letter to the Editor, The Charleston Daily Mail (W. Va.), Dec. 10, 2004, at 4A ("Justice Brent Benjamin, as everyone knows, is bought and paid for by Blankenship.").

members of the bench would apply *a fortiori* where the source of funds is the CEO of a litigant and the amount in question is in excess of three million dollars. That *a fortiori* dynamic is particularly pertinent where, as here, the operative standard requires disqualification whenever "the judge's impartiality might reasonably be questioned." *See infra* Part II.B.

Concerns about fiscal influence are cast into dramatic light by the startling sequence of events at issue in this petition. Pet. 5-8. In 2004, Mr. Blankenship made $517,707.53 in personal, direct expenditures in support of Justice Benjamin's candidacy, including radio and newspaper advertisements, campaign flyers, and telephone calls to registered voters. Mot. of Resp't Corps. For Disqualification of Justice Benjamin Exs. 18, 24. He also contributed millions of dollars more to Section 527 organizations that supported Justice Benjamin or opposed his opponent – more than any other person or group that election cycle.[6] Rachel Weiss, *Fringe Tactics: Special*

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[6] This case is only about recusal when parties or counsel in a pending suit give massive support to a candidate who sits or intends to sit in that case. It does *not* concern any limitations on the support itself. Rather, this case, in which Mr. Blankenship's direct and indirect expenditures accounted for 60 percent of all combined support for Justice Benjamin, allows the Court to address the due process issues without the need for elaborate inquiry into whether a line should be drawn between direct expenditures supporting a candidate and expenditures supporting independent entities that, in turn, support that candidate. As a practical matter, distinctions between direct and indirect expenditures have only marginal salience when it comes to

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Interest Groups Target Judicial Races 5 (The Institute on Money in State Politics 2005), http://www.followthemoney.org/press/Reports/200508251.pdf. In all, Mr. Blankenship poured more than $3 million into the race – more than the entire amount spent on Justice Benjamin's campaign by all other supporters *combined* – all while Massey was planning to appeal a $50 million trial court verdict to the court on which Justice Benjamin would sit. Len Boselovic, *W. Va. Court Won't Hear Appeal in Massey Case,* Pittsburgh Post-Gazette (Pa.), May 24, 2008, at A10.

Even members of Justice Benjamin's own bench recognize the toll exacted by his refusal to recuse in this case. In the words of Justice Larry Starcher, "Mr. Blankenship's bestowal of wealth" has created "a cancer in the affairs of [West Virginia's] court." Starcher Recusal Order at 9. Justice Starcher added that he knew "hardly a soul who could believe" that a justice in Justice Benjamin's position vis-à-vis Mr. Blankenship "could rule fairly on cases involving that

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applying the general disqualification standard of whether a judge's impartiality "might reasonably be questioned." In any event, the amount of money involved in this case, the fact that the money consisted of both direct and indirect expenditures, the fact of the sole interested source, and the timing of the appeal, together obviate the need to distinguish direct and indirect expenditures. Whatever First Amendment interest a litigant or counsel has in spending in a campaign, he or she has no constitutionally-protected interest in gaining a litigation advantage on that basis.

litigant or his companies – or appoint judges to sit on those cases." *Id.* at 7.

Elected legislators are expected to serve interest-group constituencies, including contributors, and the representative branches function best when officials are lobbied by contributors and non-contributors alike. Judges – including elected judges – are different in constitutionally salient ways. Judges are responsible for the fundamental promise of fair, impartially-decided cases. Judges function properly when they are "lobbied" only within the structured adversarial process and solely on the basis of law, not personal interests. We all suffer when any decision reinforces suspicions that the biggest donor, and not the best case, wins. And the trend lines in judicial elections raise real concerns that a denial of certiorari in this case will exacerbate the broader problem.

II. The Court Should Grant Certiorari In This Bellwether Case To Clarify The Due Process Floor For Recusal.

A. Due Process Entitles Litigants To A Judge Free Of Bias Or The Appearance Of Bias.

This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136 (1955). Yet this Court has also recognized the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*,

501 U.S. 380, 400 (1991). The facts of this case show that the tension noted in *Chisom* is not merely theoretical. As this Court expressly found in *White*, preventing bias for or against particular parties is an essential concern under the Due Process Clause. 536 U.S. at 775-76. It is precisely this narrow form of bias that is at issue here. There could scarcely be an instance in which there is a more acute need for the Court to explain whether, and, if so, under what circumstances, the Due Process Clause of the Fourteenth Amendment requires recusal.

A judge generally has only two litigants before him or her. What follows is almost always a zero sum game: one litigant will win, one will lose. The prize at stake may be a large amount of money, one's freedom or even one's life. Accordingly, maintaining the integrity of the judiciary and respect for its judgments is a state interest "of the highest order." *Id.* at 793 (Kennedy, J., concurring); *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (explaining that a state may protect against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process"). Recusal is an incomplete but vital fairness protection. Yet without this Court's intervention, recusal is in danger of becoming a nullity, invoked only out of altruism – and as such, unpredictably – disadvantaging litigants and diminishing the courts.

B. Variable Enforcement Of Recusal Standards Is Becoming The Norm, Exacerbating The Due Process Problem.

Certain features of disqualification law are largely consistent across United States jurisdictions. The most widely shared is Rule 2.11(A) of the ABA's 2007 Model Code of Judicial Conduct (formerly Canon 3E(1)): "A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality *might* reasonably be questioned." ABA Model Code of Judicial Conduct Canon 2 R. 2.11 (2007) (emphasis added). That general standard has been incorporated into federal law and the judicial conduct codes of forty-seven states, and it offers the most expansive ground for disqualification everywhere it appears. *Fair Courts*, at 17.

For the most part, the general standard works well. But in certain instances, such as in this case, a judge either fails to apply the general standard, or simply refuses to recognize that it is unquestionably unreasonable *not* to conclude that his or her impartiality "might reasonably be questioned." It is in such instances that litigants and judges need guidance as to when recusal is constitutionally required. A scenario in which, for example, ninety-nine out of one-hundred judges adhere to the general disqualification standard while an isolated colleague ignores it without consequence – even in cases that, under the standard, cannot credibly be described as "close" – encourages and induces precisely the most dangerous attempts to purchase influence. Such a state of affairs

redounds to the detriment not only of litigants and the public, but to the ninety-nine other judges as well.

This case is that scenario in microcosm. Justice Benjamin refused to recuse himself based upon his subjective belief that he could be fair, while Justice Starcher did recuse himself, despite a finding that he too could be fair, based upon the further finding that his failure to recuse could create an appearance of impropriety. And as this Court observed in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all."

Amici do not suggest that *any* campaign expenditure by a litigant on behalf of a judge necessitates disqualification. But the proposition that campaign expenditures, regardless of the amounts, timing, or manner in which they are made never cross over "the outer boundaries of judicial qualification" established by the Due Process Clause would in effect nullify one of the Constitution's most fundamental protections. *Lavoie*, 475 U.S. at 828.

As the Honorable Thomas R. Phillips, retired Chief Justice of the Supreme Court of Texas recently wrote, "Now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment." *Fair Courts*, at 3. By singling out this case as a violation of due process, the Court

would signal to judges, litigants, and counsel across the nation that disqualification standards must be taken seriously. The communicative impact of a reversal and remand in this case, moreover, would discourage future erosion of judicial independence. Not only would such a signal bolster the efforts of the vast majority of the nation's state court judges, i.e., those committed to the highest ideals of due process, but it would do so without extensively involving the Court in jurisdictionally unique and otherwise idiosyncratic circumstances best addressed by the state courts themselves.

C. This Case Presents An Important And Unique Opportunity For the Court To Clarify The Due Process Floor And The Court's Failure To Do So Would Harm Judicial Independence.

The national profile of this bellwether case makes it all the more important that this Court grant certiorari. *See, e.g.*, Tim Jones, *Lobbyist Cash Clouds Judicial Races*, Chicago Tribune, July 28, 2008, at C1; Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22; Len Boselovic, *W. Va. Ruling Faces Appeal to Top Court; Mining Firm Claims Bias in Favor of Massey*, Pittsburgh Post-Gazette (Pa.), April 4, 2008, at A1; Kris Maher, *Massey Wins Latest Round with Harman*, Wall St. J., April 4, 2008, at B4; James Sample, Op-Ed, *Justice for Sale*, Wall St. J., Mar. 22, 2008 at A24; Carol Morello, *W. Va. Supreme*

Court Justice Defeated in Rancorous Contest, Wash. Post, Nov. 4, 2004, at A15. The nation is watching closely what the Court does in this case. Litigants and their lawyers may interpret a denial of certiorari as an indication that even a blatant appearance of partiality does not lead to correction, and that, in effect, there are no real due process constraints on recusal. Such a ruling may well trigger a rapid race to the bottom, as litigants are forced to come to terms with the possibility that, at least in certain instances, justice may actually be for sale. Only if this Court grants certiorari can it put appropriate and manifest muscle into the constitutional commitment to a lack of judicial bias for or against particular litigants.

Significantly, the facts in the petition furnish the Court with an opportunity to address the issue of recusal in a case in which a simple, clean holding is possible. Because the amount of money, the sole interested source of the funds, the timing of the expenditures, and the other facts of this case are so egregious – by today's standards at least – the case does not present more complex questions about how much is too much, or how remote an interest is too remote. *Amici* thus agree with Petitioners that this case offers the Court the ideal opportunity to offer much needed guidance on one of the most fundamental rights in *any* system of law.

CONCLUSION

For the foregoing reasons *Amici* respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

AZIZ HUQ
Counsel of Record
JAMES SAMPLE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

Counsel for Amici Curiae

Dated: August 1, 2008

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Petitioners,

–v.–

A.T. MASSEY COAL COMPANY, INC., ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* THE COMMITTEE FOR ECONOMIC DEVELOPMENT IN SUPPORT OF PETITIONERS

DANIEL F. KOLB
Counsel of Record
EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH S. MCDONALD
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amicus Curiae

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IN THE

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HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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BRIEF FOR *AMICUS CURIAE* THE COMMITTEE FOR ECONOMIC DEVELOPMENT

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae the Committee for Economic Development ("CED") is an independent, nonpartisan, trustee-directed organization of business leaders dedicated to policy research on

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37, amicus curiae states that counsel for amicus authored this brief in its entirety. No person or entity other than amicus, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief.

economic and social issues and the implementation of its recommendations by the public and private sectors. CED's trustees include leaders of America's largest corporations and business organizations – companies that operate around the country and the world. Throughout its 66-year history, CED has addressed national issues that promote economic growth and development in the United States.

CED believes that public confidence in the judicial system is a critical element of America's stable, prosperous business climate, which depends upon an even-handed justice system to resolve disputes. As Justice Story wrote, "[n]o man can be insensible to the value, in promoting credit, of the belief of there being a prompt, efficient, and impartial administration of justice . . . ." 3 J. Story, *Commentaries on the Constitution of the United States* § 1685, at 564 (1833). Encouraged by its trustees' belief in the importance of judicial integrity, and consistent with its mission to promote policies that encourage economic growth, CED has consistently worked on a range of questions pertaining to judicial reform.

Essential to public confidence in the judiciary is the assurance that justice is not for sale and that legal disputes will be resolved by a fair and impartial judicial officer. Where, as here, a party or its representative has made disproportionately large campaign contributions to a judge, that judge's impartiality in a case involving the contributor is cast into doubt. A decision by that judge to hear such a case has far-reaching consequences because it erodes public confidence that future cases will be

decided fairly. It would take no more than a handful of high profile cases like this one to create a perception of unfairness that taints the vast majority of ordinary, good faith contributions. Recusal in such a situation is essential, both to guarantee due process in that individual case and to preserve confidence in the judiciary.

Because of the importance of clearer guidance on the subject and because there is uncertainty among judges as to the circumstances in which due process requires recusal, CED strongly supports the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case raises an important, unsettled question of law: whether due process requires an elected state supreme court justice to recuse himself where the CEO of a party has made and solicited outsized contributions to support the justice's campaign for election. By not recusing himself from the appeal of a $50 million jury verdict against A.T. Massey Coal Company ("Massey") – after he received over $3 million in post-verdict, pre-appeal campaign support from Massey's CEO – West Virginia Supreme Court Justice Brent Benjamin created an appearance of bias that would diminish the integrity of the judicial process in the eyes of any reasonable person. The resulting appearance of impropriety was so severe that petitioners cannot be said to have received due process.

A holding by the Court that the Due Process Clause required Justice Benjamin's recusal would

provide crucial guidance to elected judges and preserve public confidence in judicial elections. Such confidence is of particular value to those engaged in commerce, who rely on even-handed justice to make informed financial and investment decisions. In the face of ever more expensive and politicized judicial elections, a decision by the Court to grant certiorari and clarify the recusal standard required by the Constitution would signal to businesses and the public at large that judicial decisions cannot be bought and sold.

A clearer due process standard with respect to recusal would place no limits on otherwise appropriate contributions. Nor would it restrict the rights of contributors and candidates to participate vigorously in campaigns. Rather, a clear indication from the Court that due process requires recusal in a case like this would preserve the integrity of both the judiciary and judicial elections. It also would allow campaign contributions, as a practice, to continue without undermining confidence in the judiciary.

ARGUMENT

I. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL OF A JUDGE WHO HAS RECEIVED OUTSIZED CAMPAIGN CONTRIBUTIONS FROM A PARTY WILL PRESERVE CONFIDENCE IN THE JUDICIARY AND PROMOTE ECONOMIC STABILITY

Consistent with the command that a "fair trial in a fair tribunal is a basic requirement of due process,"

In re Murchison, 349 U.S. 133, 136 (1955), this Court has made clear that recusal may be required of a judge with a significant personal interest in a case, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). However, the Court has not yet considered whether due process requires recusal of a judge who has received substantial campaign contributions from a party to a case or its representatives, and lower courts have diverged on the question. In view of the importance of maintaining confidence in the judiciary notwithstanding the increasing cost and politicization of judicial campaigns, CED urges the Court to grant the petition.

A. Confidence in the Judiciary Is Fundamental to a Fair Legal Climate and Promotes Economic Growth

Both the fact and the appearance that legal disputes will be resolved by unbiased, impartial judges are essential to preserving confidence in the judiciary. The belief among the business community that justice is even-handed affects economic decision-making, reduces the perception of risk, and encourages consistent adherence to transparent rules of law. As Justice O'Connor explained, "the point of due process . . . is to allow citizens to order their behavior." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

The integrity of the American judicial system allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of business decisions. For American businesses, including CED's supporting

organizations, the ability to carefully assess risks and benefits is critically important.

Corporate actors appear frequently in a variety of courts. Although it may not be possible for a corporate litigant to predict the outcome of disputes with certainty, a corporation can nonetheless make informed business decisions – and take informed risks – based on its knowledge of a case, the court, and the judicial system as a whole. The due process concerns described in the petition threaten to undermine the ability of businesses to make such informed choices. Without exaggerating the predictability of judicial decisions, it certainly is true that where outsized judicial contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.

There is much evidence that such confidence has already been impaired. In 2007, CED commissioned Zogby International to survey business leaders regarding state judicial election fundraising. Zogby surveyed 200 senior executives, primarily at companies with more than 500 employees. Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3–4 (2007). The results show that American business leaders are concerned that disproportionately large campaign contributions are influencing judges' decisions and creating an unacceptable appearance of such influence. Four in five business leaders expressed concern that

"financial contributions have a major influence on decisions rendered by judges," *id.* at 4, and survey respondents were nearly unanimous in the opinion that judges should recuse themselves from cases involving contributors, *id.* at 6.

These results are consistent with those in a 2002 survey of more than 2,400 state court judges, which found that 46% of such judges believe that judicial campaign contributions have at least "a little" influence on decisions by the recipients of those contributions. Greenberg Quinlan Rosner Research, Inc. & American Viewpoint, *Justice at Stake – State Judges Frequency Questionnaire* 5 (2002). A majority of state court judges believe judges should be prohibited from presiding over cases in which any party has contributed money to the judge's campaign. *Id.* at 11.

Both litigants and judges believe that campaign contributions influence judicial decisionmaking. Whether or not that is actually the case, the fact that the perception is so widespread makes it imperative that this Court clarify that due process requires recusal in cases like this.

B. Certiorari Is Warranted in Light of the Increased Cost and Politicization of Judicial Campaigns, Greater Likelihood of Campaign-Related Recusal Motions, and Disagreement Among Judges Deciding Such Motions

Additional clarity on this question of due process is particularly important now, as judicial campaigns become more expensive and more politicized. In the

four most recent election cycles, judicial candidates raised nearly twice the amount raised in the four election cycles preceding them. James Sample et al., *The New Politics of Judicial Elections* 15 (2006). In recent years, exceptionally expensive judicial campaigns have taken place in states such as Alabama, Eric Velasco, *TV Ads Drive Up Campaign Tab: Nabors-Cobb Race Costliest in Nation for Judicial Post*, Birmingham News, Oct. 15, 2006, at 17A; Georgia, Jill Young Miller & Jeremy Redmon, *Foes in Judicial Contest Go Dirty*, Atlanta Journal-Constitution, Oct. 31, 2006, at A1; Illinois, Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle*, Chicago Sun-Times, Nov. 1, 2004, at 18; and Wisconsin, Bill Mears, *Big Money, Nasty Ads Highlight Wisconsin Judicial Race*, CNN.com, Mar. 31, 2008, http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race. As judicial campaign contributions continue to increase in the 39 states that elect some or all of their judges, Am. Judicature Soc'y, *Judicial Selection in the States* 4–7 (2008), the frequency of recusal motions stemming from contributions by parties or their officers or counsel can be expected to increase as well.

Lower court judges, who in West Virginia and many other states are the sole arbiters of motions seeking their recusal, look to this Court to set the "outer boundaries of judicial disqualifications" required by federal due process. *Aetna*, 475 U.S. at 828. Currently, elected judges faced with recusal motions stemming from campaign contributions by parties or their officers or counsel have little guidance on where those boundaries lie. A statement from this Court that the outsized contributions made

by Massey's CEO to Justice Benjamin's campaign "might lead him not to hold the balance nice, clear and true between the" parties, *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), would provide lower courts with a much-needed benchmark against which to measure more frequent requests for recusal.

Divergent decisions by lower courts also show the need for guidance on this issue. In *Pierce v. Pierce*, the Supreme Court of Oklahoma disqualified a trial judge from presiding over divorce proceedings where one party's attorney had, during the pendency of those proceedings, donated $5,000 to the judge's reelection campaign and solicited additional contributions on the judge's behalf. 39 P.3d 791, 793–94 (Okla. 2001). The court, applying federal due process principles, concluded that "due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799. Another state supreme court has stated that due process may require recusal where a party makes "substantial" campaign contributions to a judge. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) (noting a political contribution may become "substantial enough that it would create a well-founded fear of bias or prejudice"). These decisions directly conflict with Justice Benjamin's refusal to recuse himself.

By granting the petition, this Court can clarify the law in this important area for state court judges,

who handle the vast majority of cases brought throughout the country. On the other hand, if Justice Benjamin's interpretation of federal due process is permitted to stand, state court judges may draw the conclusion that due process imposes no meaningful limits on their recusal decisions, and public confidence in judicial decisionmaking will continue to suffer.

II. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL IN THIS CASE WILL PRESERVE FAIRNESS WITHOUT LIMITING POLITICAL SPEECH

As frequent litigants in state courts and participants in judicial campaigns, American businesses have an interest in ensuring both the appearance of even-handed justice and the protection of their First Amendment rights to participate vigorously in judicial elections. Recusal provides an effective and necessary means of avoiding an impermissible appearance of bias without restricting free speech. In fact, it serves to reinforce the legitimacy of widespread participation in judicial elections by demonstrating that campaign contributions are not a means for parties to purchase votes in their own cases.

This Court has made clear that "[i]mpartiality" in the sense of "guarantee[ing] a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party" is not merely a state interest that might justify regulation, but is "essential to due process." *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002). Indeed,

Justice Kennedy's concurrence in *White* explicitly acknowledged that a federal due process floor exists independent of state recusal standards. *Id.* at 794 (noting a state's ability to "adopt recusal standards more rigorous than due process requires" in order to preserve the integrity of its elected judiciary).

Although some attempts to reconcile judicial impartiality and electoral accountability inappropriately infringe First Amendment rights, *see id.* at 787–88, recusal preserves due process and alleviates perceived bias without offending our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2665 (2007) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Many of the firms who support CED exercise their constitutional right to political expression through contributions to judicial candidates and organizations who support them. This case does not call into question the propriety of such participation.

To the contrary, if the Court grants the petition and holds that Justice Benjamin's refusal to recuse himself from Massey's appeal violated federal due process, it would in no way limit the rights of Massey's CEO or others to support candidates for judicial office. Nor would it restrict the ability of those candidates, like Justice Benjamin, to campaign vigorously for office. Moreover, such a holding would not preclude judges from presiding over cases involving legal issues that generally have an impact on their largest supporters.

By granting the petition in this case, the Court can underscore a fundamental premise of our judicial system: that cases are decided based on their merits, not on campaign contributions. At the same time, all participants in judicial campaigns, including the business community, will benefit when contributions are properly seen as support for ideas and philosophies in the public forum rather than as attempts by particular parties to buy votes in pending or future cases.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record

EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH S. MCDONALD
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

HUGH M. CAPERTON, *et al.*,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

ALAN B. MORRISON
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

ALLISON M. ZIEVE
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization incorporated and headquartered in the District of Columbia, with approximately 80,000 members nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its members have been and will continue to be parties to and appear as amicus curiae in litigation in state courts presided over by elected judges. As a corporation, Public Citizen is prohibited by the law of most states from contributing to political campaigns. Even if it were not prohibited from doing so, it could not afford to make substantial contributions and, in any event, would not do so because of concern that such contributions create the appearance that justice is for sale.

For many years, Public Citizen has been concerned about the due process implications of judges presiding over cases in which a party or a party's lawyer has made significant campaign contributions. In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*, Civil No. A-00-

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[1]Counsel of record for all parties received notice at least 10 days prior to the due date of amicus Public Citizen's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than Public Citizen made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

CA-218 (N.D. Tex.). *Bomer* was brought by five Texas lawyers and two non-profit organizations, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. The plaintiffs—some of whom had contributed to judicial elections and some of whom had not—all believed that the system of financing judicial elections in that state created the appearance, if not the reality, of partiality and impropriety of Texas state judges, to the detriment of the legal profession, the lawyer-plaintiffs' law practices, and their clients' and/or members' interests.

The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts even to consider campaign contributions from a party or its lawyer to a judge on the case as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, the Fifth Circuit affirmed the dismissal on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001).

The outcome of Public Citizen's systemic challenge and of individual cases in Texas and elsewhere illustrates the difficulty of obtaining judicial review of the due process issue presented in this case, in *Dupre v. Texon Corp.*, No. 08-41 (docketed July 7, 2008), and in *Walston v. Walston*, No. 07-1508 (docketed June 3, 2008). At the same time, the frequency with which the due process issue arises is illustrated by the fact that three pending petitions present substantially the same problem, in different factual settings.

Public Citizen is filing this brief to highlight the breadth of the problem, which extends well beyond cases involving eye-catching contribution amounts or multi-million dollar verdicts. We urge the Court to grant the petition in this case, as well as the petition in *Dupre*, to address the circumstances under which judicial campaign contributions can create an appearance of impropriety that threatens the public's and litigants' faith in the judicial system and violates due process.

REASONS FOR GRANTING THE WRIT

The petition in this case, like the pending petitions in *Dupre* and *Walston*, asks whether judicial campaign contributions can ever form the basis for recusal of a judge and, if so, under what circumstances recusal may be required. As discussed below, these questions are disputed among the state courts, some suggesting that recusal would never be required based on contributions and others recognizing that, in some circumstances, contributions can create an unconstitutional appearance of impropriety requiring a judge's recusal.

The due process issue presented here can arise at all levels of the elected state judiciaries, in cases as newsworthy as the overturning of the $50 million verdict in this case, and as personal as the divorce proceedings in *Walston*. The issue is recurring. *See, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006) (denying petition for certiorari) (trial judge received more than $350,000 in donations from one party, its lawyers, and amici and their lawyers, and more than $1 million from groups with which the party

was affiliated); *Consolidated Rail Corp. v. Wightman*, 529 U.S. 1012 (2006) (denying petition for certiorari) (while case was pending on petitions for discretionary review, party's counsel and his close family members contributed 4.4% and 4.7%, respectively, of total contributions received by each of two justices). And with the increasing levels of judicial campaign fundraising in recent years, the need for this Court's guidance on the questions presented has also increased. The potential for a due process violation may arise from contributions made by a party to litigation, a lawyer, a local political party, or an amicus with business or other financial interests affected by the suit. Contributions may be very large or more modest, and the percentage relative to the judge's total contributions may sometimes be more important than the amount looked at in isolation. In addition, nonmonetary contributions to a judge's campaign, such as fundraising or a leadership position in the campaign, often coupled with financial support, may also bear on a due process claim.

Public Citizen urges the Court to grant the petition to address the issues presented when an individual with interests at stake in a lawsuit makes or has made substantial campaign contributions to the judge(s). In deciding the question presented, the Court should prescribe factors for state courts to consider in individual cases. Such factors might include, for example, the amount of donations from interested parties, the timing of the donations, and the percentage of the donations relative to the total contributions received. Public Citizen also urges the Court to grant both this petition and the petition in *Dupre* to enable

the Court more fully to evaluate and address the various circumstances under which campaign contributions may create an unconstitutional appearance of partiality.

I. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).[2] The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).

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[2] *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) ("goal" of federal recusal statute, 28 U.S.C. § 455(a), "is to avoid even the appearance of partiality").

Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists could not preside over hearing against competing optometrists). *See, e.g., Ward*, 409 U.S. at 58-59 (invalidating scheme whereby mayor responsible for revenue production also adjudicated traffic and ordinance violations, where fines and other money derived from proceedings in mayor's court accounted for substantial portion of village's revenue); *Marshall*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").[3]

Petitioners' case exemplifies the constitutional risk of allowing interested parties to finance expensive judicial campaigns. Whether or not the decisions below were in fact affected by the sizable campaign

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[3]Justice O'Connor has raised the question whether "the very practice of electing judges undermines" the interest in a judiciary that both is and appears to be impartial, and she has emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

contributions described in the petition, petitioners can have no faith that the outcome of the case was not affected by the contributions to the judge who ruled against them. Indeed, the appearance of partiality in this case—where A.T. Massey Coal's chief executive officer contributed $3 million to a state supreme court justice while preparing to appeal a $50 million verdict against his company, and that amount was more than 60 percent of the total contributions received by the justice—is much stronger, and the connection between the money and the appearance of impropriety is far more direct, than in *Ward*.

II. It Is Widely Recognized That Campaign Contributions Can And Often Do Create An Appearance Of Partiality.

Contributions to and expenditures in judicial campaigns have markedly increased in recent years. *See generally* Amicus Br. of Brennan Center at I.A. Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, businesses, and groups with a significant number of cases pending before the courts, are the primary contributors to candidates for judicial office. For example, the parties and lawyers involved in six of the nine cases heard by the Texas Supreme Court in February 2004 had contributed $716,279 to the nine justices. Texans For Public Justice, *Dollar Docket* (Mar. 2004), *available at* www.tpj.org/publication_list.jsp?typeid=1. Such figures are not unusual. *See id.* (contribution totals from Feb. 2002 - Apr. 2004).

Facts such as these undermine the public's respect for the judicial system in states with elected judges.

Survey after survey shows that a large majority of the public believes that contributions to state judicial campaigns influence the judges' decisions. *See, e.g.*, Minn. Jud. Branch, *The Minnesota Difference: The Minnesota Court System and the Public* 16 (2007), *available at* www.mncourts.gov/?page=519; *Report from the Commission to Promote Public Confidence in Judicial Elections* 13 (N.Y. June 29, 2004), *available at* www.nycourts.gov/press/ (report on public confidence in NY judicial election process); National Center for State Courts, *How The Public Views The State Courts, A 1999 National Survey* 3 (May 1999), *available at* www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf; *see also* Br. of Amicus Brennan Center at 11-12. Indeed, this concern was the thrust of the amicus brief filed by 40 corporations in support of the petition for certiorari in *Dimick v. Republican Party of Minnesota*, No. 05-566 (filed Jan. 4, 2006).

That significant campaign contributions from a litigant or interested party may create an appearance of partiality is well accepted. What remains controversial—and cries out for this Court's attention—are the circumstances in which this appearance arises, such that due process is violated and recusal is necessary.

III. The States' Varying Approaches Demonstrate The Need For This Court's Guidance.

The American Bar Association's Model Rule of Judicial Conduct states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." ABA

Model Code of Judicial Conduct, Canon 2, R. 2.11(A) (2007). Among the circumstances that warrant disqualification, the 2007 amendments to the Model Code added campaign contributions above a minimum amount (not specified in the Model Code) from a party, his or her lawyer, or the law firm. *Id.*, R. 2.11(A)(4).

Although most states have adopted the general standard of Rule 2.11(A), they apply it in markedly different ways when considering whether campaign contributions to a judge presiding over litigation from parties interested in that litigation have created an unconstitutional appearance of partiality. For example, in *Dupre*, the Ohio Supreme Court seemed to reject out of hand the notion that campaign contributions could create a due process issue. *See* Petition for Cert. in *Dupre*, *supra*, App. at 1a (dismissing appeal "as not involving any substantial constitutional question"). *Cf. In re Disqualification of Burnside*, 863 N.E.2d 617, 619 (Ohio 2006) (denying motion to disqualify after fact-specific review).

Similarly, Texas courts have repeatedly rejected the argument that acceptance of campaign contributions from a party or its lawyer may constitute a due process violation or provide grounds for recusal. *See Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that "bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . . has been rejected by the courts of this state"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (no recusal where judge personally solicited and lawyer contributed while case pending); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App.

1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. S. Tex. Sports, Inc.*, 673 S.W.2d 952, 952-53 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee). Given the steadfast refusal of the Texas courts to consider campaign contributions a basis for recusal, the constitutional issue will continue to go unaddressed in that state, unless this Court makes clear that state courts may not close their eyes to the due process issue raised by significant campaign contributions by interested persons to judges sitting on a case.

Other state high courts, however, have reached different conclusions. And although some of the cases base their holdings on state-law canons, rather than due process analysis, due process considerations, including the right to an impartial judicial decisionmaker, are at the heart of each decision.

For example, the Oklahoma Supreme Court recognizes that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). Although in Oklahoma a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him," due process may require disqualification in an individual case. *Id.* at 798 (disqualification required when a

lawyer made maximum campaign contribution allowed by statute, member of lawyer's immediate family contributed, and lawyer solicited contributions for judge's campaign).

The Florida Supreme Court has held that receipt of legal campaign contributions from parties or their lawyers does not itself require disqualification, although disqualification may be warranted if an additional factor is present, such as the party's lawyer serving as chair of the judge's campaign. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 & n.5 (Fla. 1990) ($500 contribution to judicial campaign of judge's spouse does not warrant disqualification).

A decision from a Kentucky Supreme Court justice granting a motion to recuse takes a similar approach. *Dean v. Boudurant*, 193 S.W.3d 744, 752 (Mich. 2006).

Similarly, in Washington, North Dakota, Tennessee, and West Virginia, "[a]lthough campaign contributions of which a judge has knowledge are not prohibited, these contributions may be relevant to recusal" or disqualification. Wash. Code of Jud. Conduct, comment to Canon 7(b)(2); *see* N.D. Code of Jud. Conduct, comment to Canon 5(C)(2); Tenn. S. Ct. R. 10 (Code of Judicial Conduct), commentary to Canon 5(C)(2)(b); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2).

Nevada's practice is closer to that of Texas, although not as absolute. On the one hand, the Nevada Supreme Court has held open the possibility that contributions could warrant disqualification: "In the context of campaign contributions, . . . a contribution to a presiding judge by a party or an attorney does not

ordinarily constitute grounds for disqualification." *City of Las Vegas Downtown Redev. Agency v. Eighth Jud. Dist. Court*, 5 P.3d 1059, 1062 (Nev. 2000) (emphasis added, citation omitted). On the other hand, the Nevada court has held that disqualification was *improper* when parties on one side of a case gave four donations to the presiding judge, ranging from $150 to $2,000. *Id.*; *see also* Nev. Code of Jud. Conduct, comment to Canon 3(E)(1) ("The mere receipt of a campaign contribution from a witness, litigant, or lawyer involved with a proceeding is not grounds for disqualification.").

In Alabama, a state statute requires recusal where judicial campaign contributions create an "appearance of impropriety." Ala. Stat. § 12-24-1; *see also* Ala. Stat. § 12-24-2(a), (b) (parties and lawyers required to disclose amount of contributions to assigned judge(s); recusal required on request of party if either opposing party or opposing counsel contributed more than $4,000 to supreme court justice or court of appeals judge, or more than $2,000 to circuit court judge). However, in a recent case, one party argued that a trial judge should have recused himself because an appearance of partiality was created by opposing counsel's $2,000 contribution and the party's own counsel's running against the judge in an upcoming election. Holding that recusal was not required, the court of appeals seemed to require a showing of *actual* bias. *Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364, *5 (Ala. Civ. App. 2008) ("[T]he party seeking recusal must come forward with evidence establishing the existence of bias or prejudice.").

And a Michigan court has held that judicial campaign contributions within the state's contribution limits, "lawfully reported and lawfully disclosed, cannot fairly constitute a basis for judicial disqualification." *Adair v. State Dep't of Educ.*, 709 N.W.2d 567, 581 (2006).

In sum, the states disagree on the extent to which campaign contributions from parties and lawyers on one side of a case can implicate the due process rights of the opposing party, although they are all reluctant in individual cases to consider fully the due process implications of judicial campaign contributions and to find an appearance of partiality. The petition should be granted to provide guidance about the circumstances under which judicial campaign contributions by litigants and their lawyers can constitute a due process violation.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Alan B. Morrison
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

Allison M. Zieve
Counsel of Record
Brian Wolfman
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

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IN THE

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HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF *AMICUS CURIAE* OF THE WASHINGTON APPELLATE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

CHARLES K. WIGGINS
Counsel of Record
Wiggins & Masters, PLLC
241 MADISON AVENUE NO.
BAINBRIDGE ISLAND, WA 98110
(206) 780-5033

Attorney for Amicus Curiae

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STATEMENT OF INTEREST[1]

A. The Washington Appellate Lawyers Association

This amicus curiae brief in support of Petitioners is filed on behalf of the Washington Appellate Lawyers Association ("WALA").

The constitution of WALA recites the following purposes of the organization, among others: to foster and encourage improvements in the practice of appellate advocacy; to promote and encourage changes in reforms and appellate procedure designed to insure effective representation of appellate litigants and more efficient administration of justice at the appellate level; to cooperate with the judiciary, the Legislature, and such other organizations and committees as may be involved in matters relating to the appellate practice; and to actively support the integrity of the appellate process and principles of ethical appellate advocacy in the spirit of a free and independent bar.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* Washington Appellate Lawyers Association or counsel for *amicus* contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief. Counsel for petitioners advises that they have filed a letter of consent with the Court. *Amicus* is filing a letter of consent from respondent.

To promote these purposes, members of WALA have actively supported improvements in judicial elections in Washington State, especially at the appellate level. Members of WALA have supported establishing limitations on contributions to committees supporting the election of judicial candidates, public financing of judicial elections, making available to the public more information about judicial elections, and exploring proposals to require recusal of judges who exceeded a threshold amount of campaign contributions from a party or counsel for a party.

Members of WALA represent a variety of individuals, organizations and governmental units in every substantive area of the law. WALA views with alarm the rapidly increasing magnitude of both judicial campaign contributions and independent expenditures in judicial races. Washington State, while by no means at the forefront of this trend, has witnessed a dramatic surge in both direct and indirect contributions to judicial campaigns. *E.g.*, Charles K. Wiggins, *The Washington State Supreme Court Elections of 2006: Factors at Work and Lessons Learned*, 46 Judges Journal 33 (Winter 2007) (hereafter "Judges Journal"). WALA submits that substantial campaign contributions and independent expenditures threaten to compromise the impartiality of even the most conscientious judge. At some point, the due process clause, interpreted in light of centuries of cultural and legal tradition on which our legal system is based, precludes a judge who has benefited from contributions or independent expenditures from sitting on a case.

The time is ripe for the Court to examine the issue, the facts of the *Caperton* case present an ideal vehicle for this examination, and contemporary campaign conduct throughout the country heightens the need for guidance from this Court.

B. Judicial Elections In Washington State

A brief description of judicial selection in Washington State further explains why *amicus* WALA urges this Court to grant certiorari. Prior to statehood, the judges of Washington territory were appointed by the President with the advice and consent of the Senate. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* 15 (1988). Residents of the territory resented the fact that many of the appointments were made without regard to local feeling or knowledge of the laws, people and land of Washington territory, with half of the judges having been from out-of-state when they were appointed. *Id.* at 17.

By 1889, when Congress authorized statehood for Washington (as well as the Dakotas and Montana), there was virtually no support among the Constitutional Convention delegates for continuing the practice of appointing judges. Charles K. Wiggins, *George Turner and the Judiciary Article: Part II*, 43 Wash. State B. News No. 10, 20 (1989).[2] The Convention

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2 The sentiment for election was amusingly expressed by attorney Lair Hill, who wrote a proposed constitution for the new state, published in the Morning Oregonian on the opening day of the convention. Hill reported the response of a

overwhelmingly decided that all supreme court judges and superior court judges (Washington's trial court of general jurisdiction) would be elected, with the governor appointing to fill mid-term vacancies. Wash. Const. art. IV §§ 3, 5.

The Constitutional Convention's choice of judicial elections is unsurprising. In the early days of the Republic, judges were appointed either by the governor or the legislature. Larry Berkson, Rachel Caulfield, *Judicial Selection of the United States: A Special Report* (1980, updated in 2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf. "At the time of the founding, only Vermont (before it became a State) selected any of its judges by election." *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002). Even today, of the five states using gubernatorial or legislative appointment of judges, four are on the east coast – Maine, New Jersey, Virginia and South Carolina – with California using a combination of

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"gentleman who had considered the subject pretty thoroughly" to the suggestion that appointed judges would be abler and more independent:

> That is a lawyer's view of it, and possibly it is correct, though I doubt it. At all events, correct or incorrect, it is immaterial; for the people of this republic have concluded that their courts of justice are of sufficient importance to warrant their being brought into conformity with republican institutions; and they are not going to allow anybody hereafter to force upon them better judges than they think they need.

Lair Hill, *Article*, Morning Oregonian July 4, 1889.

gubernatorial appointment of appellate judges and popular election of superior court trial judges. American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf.

In the early part of the 19th Century, appointment of judges lost favor due to resentment of control over the judiciary by the landed upper class, and through the influence of popular sovereignty generally described as Jacksonian Democracy. Burkson & Caulfield, *supra*. "'Between 1846 and 1912 every new state entering the Union embraced' popular elections, and many of the earlier appointive states changed to this mode of recruitment." Sheldon, *supra* at 22, (quoting Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, American Bar Foundation Research Journal (Spring 1984), 346-47).

The delegates to the 1889 convention assumed that judges would be chosen through partisan elections (although the Constitution is silent on the subject). In 1907 the legislature provided that judicial elections would be non-partisan. Sheldon, *supra*, at 43.

Throughout the twentieth century, a number of states moved from elective systems to commission systems (also known as merit selection or the "Missouri Plan"). Commission systems have been studied and proposed in Washington at least four times: in 1934 by the Washington State Bar

Association ("WSBA"); in 1969 by a Constitutional Revision Commission appointed by Governor Daniel Evans; in 1995 by the Walsh Commission, with members appointed by all three branches of state government; and in 2007 by a majority report of the Task Force of the WSBA, which was subsequently rejected by the Board of Governors of the Association. John Ruhl, *President's Page: Bills Back Judicial Appointment To End Special Interest Wave,* King County Bar Bull. (March 2007) *available at* www.kcba.org/scriptcontent/kcba/barbulletin/archive/2007/07-03/prespage.cfm; WSBA News Flash (June 2008), www.wsba.org/newsflash0608.pdf. Bills calling for a popular vote on a constitutional amendment to adopt a commission system are periodically introduced in the Legislature, but none has succeeded.

Meanwhile, campaign contributions and independent expenditures for Washington Supreme Court elections have recently increased dramatically. The total funds spent by all Supreme Court candidates in one election cycle did not top $1 million until 2004, when the candidates spent $1.2 million.[3] Judges Journal, *supra* at 33. From 1990 through 2004, only five candidates raised and spent over $200,000. *Id.* But in 2006, the total spending on Supreme Court elections quadrupled. *Id.* at 34.

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3 The Washington Supreme Court has nine justices serving six-year staggered terms, with three justices up for election each even-numbered year. RCW 2.04.070-.071.

These historical facts give rise to the concern of *amicus* WALA. The choice of an elective system in Washington State, as doubtless in most states, has been dictated by history. Whatever its merits or demerits, Washington's system of electing judges overwhelmingly resists change and will likely persist for some time to come. Although no single special interest has succeeded in electing a judge to the Washington Supreme Court through contributions and independent expenditures, the West Virginia experience, and the experience of other states, teaches that special interest success is only a matter of time. *Amicus* WALA urges the Court to grant certiorari to begin to define the parameters of the due process clause as applied to judges who are elected through substantial contributions and independent expenditures.

SUMMARY OF ARGUMENT

This Court's prior decisions establish beyond cavil that the protections of the Constitution, and especially the due process clause, apply to judicial elections and specifically to the potential financial interest of a judge in the outcome of a case. Just as election supporters have a first amendment right to support the judicial candidates of their choice, so litigants have a due process right to judicial decisions free of financially-interested judges. In this era of rapidly increasing contributions and independent expenditures in state judicial elections, the Court should grant certiorari to analyze and define the application of the due process clause to the impact of such contributions and expenditures.

In defining the application of the due process clause to judicial campaign contributions and expenditures, the Court draws on a rich tradition prohibiting financially-interested judges from deciding cases. The Court can draw on accumulated wisdom on this subject from early Biblical times to the Magna Charta, from the common law to the ABA Canons of Judicial Ethics. Moreover, this Court has already laid a foundation for applying due process to judicial campaign expenditures.

Amicus WALA suggests that in defining the due process parameters applicable to judicial campaign contributions and expenditures, the Court consider the following non-exclusive factors: the amount of money involved; the directness of the relationship of the contribution/expenditure to the case; the availability of another judge to substitute for the financially-interested judge; and, the availability of review of the decision of an individual judge not to recuse or disqualify himself or herself from the case. A decision by this Court will provide much-needed guidance to judicial candidates, campaign donors and supporters, non-donor litigants, and the courts in general.

ARGUMENT

A. The Selection Of Judges Is Subject To Fundamental Constitutional Rights And Limitations, Especially The Due Process Clause.

This Court has clearly held that the selection of judges by popular election is subject to the fundamental protections and limitations set forth in the United States Constitution. *Republican Party of Minn. v. White, supra.* Despite the diversity of the opinions in *White*, the key issue is the importance of judicial independence and impartiality. 536 U.S. at 775 (Scalia, J.); 536 U.S. at 788 (O'Connor, J., concurring); 536 U.S. at 793 (Kennedy, J., concurring); 536 U.S. at 797 (Stevens, J., dissenting); 536 U.S. at 804-05 (Ginsburg, J., dissenting). As Justice O'Connor pointed out in her concurring opinion,

> [R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups. . . . Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."

536 U.S. at 790 (O'Connor, J., concurring). Justice Kennedy noted that it is vitally important to maintain the integrity of the judiciary: "Judicial

integrity is, in consequence, a state interest of the highest order." 536 U.S. at 793 (Kennedy, J., concurring).

The Court has also found violations of the due process clause where judges have sat in cases in which they had an interest in the outcome of the case. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Bracy v. Gramley*, 520 U.S. 899 (1997); *In Re Murchison*, 349 U.S. 133 (1955).

In light of these precedents, there can be no doubt that due process places some limit on the propriety of a judge who has received campaign contributions to sit in judgment in a case involving that party. As the petition points out, judicial campaign contributions have increased dramatically in recent years. This Court has not yet had an opportunity to define the relationship between judicial campaign contributions and the due process clause. The time is right for an exploration of that relationship, judicial contributors deserve guidance on the impact their contributions may have, non-donor parties to lawsuits need guidance on the applicable principles, judges themselves would benefit from this Court's review, and this case presents an ideal vehicle for such a review.

B. Two Of The Most Fundamental Protections Of Due Process Are Judicial Impartiality And Independence From Financial Interest In The Case.

This Court looks to legal traditions from ancient times through English history to the American experience in measuring the parameters of the due process clause. *In re Winship*, 397 U.S. 358, 361-62 (1970); *Klopfer v. North Carolina*, 386 U.S. 213, 223-25 (1967). The prohibition against adjudication by a financially-interested judge is of ancient vintage and has been repeatedly articulated down through the centuries. By defining the application of the due process clause to judicial campaign contributions, this Court will be building on a solid foundation, applying a well-established principle to recent developments in judicial election campaigns.

The prohibition against financially-interested judges is rooted deep within the Judeo-Christian heritage. The law of Moses directed the appointment of judges who "shall judge the people fairly": "Do not pervert justice or show partiality. Do not accept a bribe, for the bribe blinds the eyes of the wise and twists the words of the righteous." *Deuteronomy* 16:18-19 (New Int. Vers.). The wisdom of this admonition played out in the early biblical narrative, when Samuel appointed his two sons as judges for Israel: "But his sons did not walk in his ways. They turned aside after dishonest gain and accepted bribes and perverted justice." *1 Samuel* 8:3 (New Int. Vers.). The writer of *1 Samuel* tells us that this so alienated the people

that they rejected the leadership of judges and demanded a king. *1 Samuel* 8:5. The writer of Proverbs teaches, "He who is greedy for unjust gain makes trouble for his household, but he who hates bribes will live." *Proverbs* 15:27 (Rev. Std. Vers.).

Several lessons emerge from these verses. First, judges are commanded to refrain from both bribery and "dishonest gain." Dishonest gain is a broader term, standing in contrast to doing justice and judging fairly, instead practicing oppression and violence. *E.g. Jeremiah* 22:15-17. Second, bribery, or seeking financial gain, "blinds the eyes of the wise", preventing them from seeing and judging correctly.

A similar pledge against bribery and unjust gain was carried into Article 40 of the Magna Charta (1215): "To none will we sell, to none will we deny, to none will we delay right or justice." (Quotation from *Parker v. Ellis*, 362 U.S. 574, 585, n. 11 (1960) (Warren, C.J., dissenting) (quoting Magna Charta, reprinted in S. Doc. No. 232, 66th Cong., 2d Sess. 17) *overruled by, Carafas v. La Vallee*, 391 U.S. 234, 240 (1968) (adopting C.J. Warren dissent in *Parker*.). The Magna Charta's prohibition against the sale of justice became the touchstone for disqualification at the common law, which was limited to judges with a pecuniary interest in the outcome of the litigation:

> At the time the American court system was established, the common law of disqualification "was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing

> else." John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). No other interest would suffice to require, or even permit, a judge to disqualify himself, including evidence of bias against a litigant. *Id.* at 611-12; see also *Aetna*, 475 U.S. at 820.

Del Vecchio v. Ill. Dept. of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994).

The common law rule against financially-interested judges is illustrated by *Bonham's Case*, 8 Coke 118a (cited at *Tumey, supra*, 273 U.S. at 524). *Bonham's Case* arose out of an early day form of licensing in which several doctors designated by the King as "censors" denied Bonham a license to practice "physic." Mark Andrew Grannis, *Note: Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 Mich. L. Rev. 382, 387 (1987). Bonham was imprisoned when he continued to practice without a license, but, "Lord Coke rendered judgment for Bonham in his suit for false imprisonment, holding that '[t]he censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . ." *Id.* at 387-88.

The common law prohibition against financially-interested judges was carried over into the first statutory disqualification standard adopted by Congress in 1792, providing that a judge should recuse in any case in which "it shall

appear that the judge of such court is, any ways, concerned in interest . . . ." Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79 (repealed 1911) (quoted in Peter Bowie, *Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice: Foreword: The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911, 913 (2007). In 1922, Chief Justice Taft chaired the American Bar Association Committee that drafted the Canons of Judicial Ethics, which provided that a judge should avoid even the appearance of impropriety. Bowie, *supra*, at 917-18. Avoiding the appearance of impropriety was carried into the 1972 ABA Code of Judicial Conduct, and eventually into 28 U.S.C. § 455(a), requiring that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* at 930-31.

This Court relied on this common law background in the series of cases discussed in the petition in this case. In *Tumey*, 273 U.S. 510, Chief Justice Taft delivered the opinion of the court finding a violation of due process under the Ohio statutory scheme in which the judge (the mayor of the village prosecuting the offense) was paid $12 for presiding over a case and finding the defendant guilty. Chief Justice Taft wrote:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the

> accused, denies the latter due process of law.

273 U.S. at 532. This Court relied on *Tumey* to find a violation of due process under a similar scheme in *Ward*, 409 U.S. 57, finding a "possible temptation" not to hold the balance nice, clear and true even though the Mayor in the *Ward* case did not have a direct financial stake in the outcome of the case.

Relying on *Tumey*, the Court held in *In re Murchison*, 349 U.S. at 136 that, "A fair trial in a fair tribunal is a basic requirement of due process." In order to prevent even the probability of unfairness, "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* And in *Aetna Life Ins.* 475 U.S. 813, the court found a violation of due process where a state supreme court justice participated in review of a bad faith refusal to pay an insurance claim where the judge was a party to a bad faith claim in a different case, that could be impacted by the decision under review.

C. The Court Should Grant Certiorari To Analyze How These Longstanding Prohibitions Against Financial Influence Apply To Modern State Judicial Elections.

The authorities discussed above, ancient and modern, are a rich source of guidance for applying the due process clause to judicial campaign contributions. Just as the first amendment limits the ability of the states to regulate speech in judicial election campaigns, so the due process

clause speaks to the right of a litigant to adjudication by a fair and unbiased judge free of any financial interest in the matter. Indeed, the applicability of the due process clause in this case is even stronger than the application of the first amendment in *White*. Unlike the announce clause in *White*, the prohibition against financially-interested judges is rooted deeply in our legal and cultural heritage. The Court should grant certiorari and analyze whether the petitioners were denied due process by the participation of Justice Benjamin in the decision of the West Virginia Supreme Court.

In applying the due process clause, the Court should consider the following factors. First, the Court should consider the amount of money involved. It is probably impossible to establish a bright line test for the level of contribution or independent expenditure that would give rise to a due process violation. But the amount of money involved is certainly a major factor. The Court may wish to consider judicial campaign contribution limits established by the various states as an indicator of the legislative judgment that there is an acceptable level of contributions that do not give rise to concern as a matter of public policy. The Court may also wish to consider the size of the contribution or independent expenditure in light of other expenditures in the judicial campaign. Whatever measure the Court may use, the expenditure of more than $3 million by the litigant's chief executive officer is a huge investment triggering the due process clause.

Second, the Court should consider the directness of the judge's interest in the outcome of the case under consideration. As this Court's precedents establish, an indirect interest suffices. Here, this case was destined for appeal during the judicial election. The $3 million spent to support Justice Benjamin was more than the total amount spent supporting Benjamin's campaign by all other sources. Petition at 2. No judge sitting on this appeal could set aside his or her awareness of the importance of these expenditures. As a matter of common sense, these expenditures directly affected Justice Benjamin's election and it is unrealistic to expect Justice Benjamin "to hold the balance nice, clear and true". *Tumey*, 273 U.S. at 532.

A third factor the Court should consider is whether the financially-interested judge can be replaced by a substitute, or whether disqualification would result in a decision by less than a full court. As members of this Court have noted, "there's no substitute for a Supreme Court Justice," making it important that members of this Court not lightly recuse themselves. Ryan Black & Lee Epstein, *Recusal On Appeal: Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. App. Prac. & Process, 75, 76-77 (2005) (quoting Ruth Bader Ginsburg, *An Open Discussion With Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1039 (2004)).

By contrast, when a justice is disqualified from sitting in the West Virginia Supreme Court, the Chief Justice or Acting Chief Justice may assign a senior justice, senior judge, or a circuit judge to serve in place of disqualified justice. W.

Va. R. App. P. 29(g).[4] Disqualification should be more readily granted in jurisdictions in which a substitute judge is available.

A fourth factor the Court should consider is whether a justice's recusal decision is subject to review by other judges. No such review is available under West Virginia Supreme Court Practice. W. Va. R. App. P. 29.[5] Where no review is available, the judge who is asked to recuse is sitting in judgment on his or her own fitness to decide the case. This practice is contrary to the long established principle that no one should sit in judgment on their own case. *Munchison*, 349 U.S. at 136. The absence of any review mechanism heightens the need for due process protection.

Amicus WALA urges the Court to hold that a court considering a due process challenge to a judge's participation in a case should consider these non-exclusive factors, together with any other factors that might bear on the due process rights of the litigant challenging a judge's participation in the case.

CONCLUSION

Substantial judicial campaign contributions and expenditures of the magnitude in this case call for analysis of the due process rights of the petitioners. Review by this Court will also provide

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4 In Washington State, if recusal of a justice reduces the court to an even number, the Chief Justice must appoint a pro tempore justice unless a majority of the court directs otherwise. Wash. Sup. Ct. Admin R. 21(a).

5 Nor is review available under Wash. S. C. Admin R. 21.

guidance to other potential judicial campaign donors and supporters, to litigants facing a judge who has benefited from substantial contributions and expenditures, and to elected judges throughout the country in ruling on requests that they recuse themselves from further participation. Amicus WALA urges the Court to grant certiorari.

Dated: August 1, 2008.

Respectfully submitted,

Charles K. Wiggins
WIGGINS & MASTERS, PLLC
241 Madison Avenue No.
Bainbridge Island, WA 98110
(206) 780-5033

Counsel for Amicus Curiae
Washington Appellate
Lawyers Association

JOINT APPENDIX

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No. 08-22

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

JOINT APPENDIX
Volume 1 of 2
(Pages 1a-339a)

THEODORE B. OLSON
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

ANDREW L. FREY
Counsel of Record
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED JULY 2, 2008
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CASE 98-C-192 BOONE

HUGH M. CAPERTON, *ET ALS.* VS. A.T. MASSEY COAL COMPANY, INC.

DATE	ACTION
10/29/98	CIVIL CASE INFORMATION STATEMENT COMPLAINT FILED BY: ROBERT V. BERTHOLD P.C. BOX 3500 208 CAPITAL STREET CHARLESTON WV 25335 PH: 345-5700 SUMMONS ISSUED TO: ROBERT V. BERTHOLD FOR SERVICE
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12/10/98	PLAINTIFF'S FIRST AMENDED COMPLAINT REC'D & FILED.
	* * *
03/13/00	NOTICE OF REMOVAL REC'D. & FILED. CERT. OF SERV. EXHIBITS "A", "B", & "C" REC'D. & FILED. NOTICE OF FILING OF NOTICE OF REMOVAL REC'D. & FILED.
06/07/01	MEMORANDUM OPINION & REMAND ORDER U.S. DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGNIA REC'D. & FILED. CIVIL DOCKET FOR CASE 100-CV-192 IN U.S. DISTRICT COURT REC ENTIRE FILE MAINTAINED IN U.S. DISTRICT COURT REC'D.
	* * *

08/16/02	JUDGMENT ORDER ENTERED ON JURY VERDICT & FILED.
	* * *
06/28/04	JURY AWARD OF PUNITIVE DAMAGES ENTERED.
	* * *
09/09/04	AMENDED CIRCUIT ORDER ENTERED ON JURY AWARD OF PUNITIVE DAMAGES AND FILED.
	* * *
03/16/05	FINAL ORDER ENTERED DENYING DEFENDANTS' RULE 50(B) MOTION FOR JUDGMENT AS A MATTER OF LAW, RULE 50(C)/59 MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE MOTION FOR REMITTITUR.
	* * *
04/06/07	ORDER FROM SUPREME COURT GRANTING PETITION FOR APPEAL ENTERED AND FILED.
	* * *

Caperton, et al. v. A.T. Massey Coal Co., et al., No. 08-22 (W. Va. Supreme Court No. 33350)

		* * *	
5	10/19/2005	Motion for Disqualification	Corporate Plaintiff's Motion to Disqualify Justice Benjamin (with exhibits) (05-167)
		* * *	
7	10/19/2005	Motion for Disqualification	Hugh Caperton's Motion to Disqualify Justice Benjamin (05-167)
		* * *	
13	4/6/2006	Motion for Disqualification	Petitioner's Motion for Disqualification of Justice Starcher (060936)
		* * *	
16	4/10/2006	Order on Disqualification	Justice Benjamin refuses to disqualify himself (05-167)

		* * *	
21	5/2/2006	Order on Disqualification	Justice Starcher's refusal to disqualify himself.
		* * *	
32	11/27/2006	Response to Petition for Appeal	Joint Response to Petition for Appeal – Hugh Caperton & Corporate Plaintiffs – filed by Bruce Stanley, Tarek Abdalla, Robert Berthold, Jr., Christina L. Smith and David Fawcett, counsel, with appendix. NOTE: Filed prior to receipt of petition for appeal and record from the circuit clerk.
		* * *	
34	12/6/2006	Petition for Appeal	Filed on behalf of A.T. Massey Coal Company, Inc., et al., by

			D.C. Offutt, Jr., Stephen S. Burchett, Perry W. Oxley and David E. Rich, Offut, Fisher & Nord, with Docketing Statement, Designation of Record and Appendix
35	4/4/2007	Granting Order	Grant (5-0) petition for appeal. Briefing schedule set.
		* * *	
43	5/4/2007	Brief of Appellant	A.T. Massey Coal Co., Inc.; Elk Run Coal Co., Inc., Independence Coal Co., Inc., Marfork Coal Co., Inc., Performance Coal Co., and Massey Coal Sales Co., Inc. filed by D.C. Offutt, Stephen Burchett, Perry Oxley, and David Rich,

			counsel.
44	6/1/2007	Brief of Appellee	Hugh Caperton's brief filed by Bruce Stanley and Tarek Abdalla, counsel (motion filed with brief to exceed page limit)
		* * *	
47	6/4/2007	Brief of Appellee	Harman Dev. Corp.'s, Harman Mining Corp.'s and Sovereign Coal Sales' Brief (Motion to Exceed Page Limit on Brief).
		* * *	
50	6/18/2007	Reply Brief	Reply Brief to Hugh Caperton filed by D.C. Offutt
51	6/19/2007	Reply Brief	Appellant's (by D.C. Offutt, Jr., Stephen Burchett, Perry Oxley and David Rich, counsel) Reply Brief to Harman Development Corp., Harman

			Mining Corp. and Sovereign Coal Sales, Inc. Appellees
		* * *	
57	11/21/2007	Signed Opinion	REVERSED AND REMANDED (Davis, C.J.) (Starcher, J. and Albright, J., dissent and reserve the right to file dissenting opinions) (Benjamin, J., concurs and reserves the right to file a concurring opinion)
58	11/21/2007	Separate Opinion	Starcher, J., dissenting
59	11/21/2007	Separate Opinion	Albright, J., dissenting
		* * *	

63	12/20/2007	Petition for Rehearing	Corporate Appellees' Petition for Rehearing filed by Robert Berthold, Christina L. Smith, David Fawcett, and Bruce Stanley, counsel (Motion to Exceed Page Limit on Petition for Rehearing filed with Petition for Rehearing)
* * *			
67	12/20/2007	Petition for Rehearing	Hugh Caperton's Petition for Rehearing, by Bruce Stanley
68	12/20/207	Separate Opinion	Benjamin, J., concurring
69	1/7/2008	Motion for Disqualification	Hugh M. Caperton's Motion to Disqualify Justice Elliott Maynard
* * *			

72	1/4/2008	Motion for Disqualification	Hugh Caperton's Amended Motion for Disqualification of Chief Justice Elliott Maynard, plus SEALED exhibits
		* * *	
74	1/17/2008	Motion for Disqualification	Motion of Corporate plaintiffs for disqualification of Justice Maynard and renewal of motion to disqualify Justice Benjamin
75	1/18/2008	Response to Motion	Appellants, A.T. Massey Coal Co., et al. response to motion to disqualify
76	1/18/2008	Order on Disqualification	Chief Justice Maynard's voluntary disqualification, pursuant to Canon 3(E)(1)(d) of the Code of Judicial Conduct and Rule 29 of

			the Rules of Appellate Procedure.
77	1/18/2008	Order on Disqualification	Justice Benjamin's refusal to disqualify himself
78	1/18/2008	Order	Assignment of the Honorable Donald H. Cookman, Judge of the Twenty-Second Judicial Circuit to replace Chief Justice Maynard who is voluntarily disqualified. (By Acting Chief Justice Benjamin)
79	1/24/2008	Order	Petition for Rehearing granted, supplemental briefing schedule set, 20 days/10 days.
* * *			

82	2/13/2008	Appellant's Brief on Rehearing	by D.C. Offutt, Stehen Burchett, and Randall Saunders, counsel.
83	2/13/2008	Appellee's Brief on Rehearing	for Hugh Caperton filed by Bruce Stanley and Tarek Abdalla, counsel
84	2/13/2008	Appellee's Brief on Rehearing	Harman Dev. Corp.; Harman Minng Corp.; and Sovereign Coal Sales, Inc. by Robert Berthold, Christine Smith, and David Fawcett, counsel.
85	2/15/2008	Order on Disqualification	Justice Starcher's Voluntary Disqualification pursuant to Canon 3(E)(1) of the Rules of Appellate Procedure.

86	2/18/2008	Order	Assignment of the Honorable Fred L. Fox, II, Judge of the Sixteenth Judicial Circuit. Justice Starcher voluntarily disqualified. (By Acting Chief Justice Benjamin)
		* * *	
88	2/25/2008	Brief of Appellee	Harman Dev. Corp.'s, Harman Mining Corp.'s, and Sovereign Coal Sales' by Rober Berthold, Christina Smith and David Fawcett, counsel.
89	2/25/2008	Brief of Appellant	A.T. Massey Coal Co., et al., Appellants, Omnibus Reply Brief to Apellees' Briefs on Rehearing, filed by D.C. Offutt, Stehen Burchett, Randall Saunders, and

			Ryan Ashworth, counsel.
90	2/25/2008	Brief of Appellee	Hugh Caperton's Response to Supplemental Brief of Appellants filed by Bruce Stanley and Tarek Abdalla, counsel.
		* * *	
94	3/28/2008	Motion for Disqualification	Hugh Caperton's, Harman Dev. Corp.'s, Harman Mining Corp.'s & Sovereign Coal Sales' Second Joint Motion for Disqualification of Justice Benjamin by Bruce Stanley & Tarek Abdalla, Robert Berthold, Christina Smith and David Fawcett, counsel
95	4/3/2008	Order on Disqualification	Justice Brent Benjamin's cotinued refusal to disqualify himself

96	4/3/2008	Signed Opinion	REVERSED AND REMANDED (David, J.) (Maynard, C.J. and Starcher, J., disqualified) (Judges Cookman and Fox sitting by temporary assignment) (Acting Chief Justice Benjamin and Judge Fox concurring) (Justice Albright and Judge Cookman dissenting)
97	4/3/2008	Separate Opinion	Dissenting opinion by Justice Albright, joined by Judge Cookman.
* * *			
101	7/28/2008	Separate Opinion	(Benjamin, J., concurring)

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Plaintiffs

v.

Civil Action No. 98-C-192

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC.,

Defendants.

JUDGMENT ORDER

After a multi-week jury trial in the Circuit Court of Boone County, the jury rendered a verdict in favor of the Plaintiffs, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. and against defendants, A. T. Massey Coal Company, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and

Massey Coal Sales Company, Inc., for compensatory damages in the sum of Twenty-Nine Million, Six-Hundred Ninety-Six Thousand Dollars ($29,696,000.00), consequential damages in the amount of Three Million Dollars ($3,000,000.00) and punitive damages in the amount of Two Million Dollars ($2,000,000.00), as is more fully set forth on the jury verdict form previously filed hereto and returned on August 1, 2002. During that same trial, the jury rendered a verdict in favor of Plaintiff, Hugh M. Caperton, and against defendants, A. T. Massey Coal Company, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., for compensatory damages in the sum of Twenty-Nine Million, Six-Hundred Ninety-Six Thousand Dollars ($29,696,000.00), consequential damages in the amount of Three Million Dollars ($3,000,000.00) and punitive damages in the amount of Two Million Dollars ($2,000,000.00), as is more fully set forth on the jury verdict form previously filed hereto and returned on August 1, 2002. During that same trial, the jury rendered a verdict in favor of Plaintiff, Hugh M. Caperton, and against defendants, A. T. Massey Coal Company, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., for compensatory damages in the sume of Three Million, Four-Hundred Seventeen Thousand, Four-Hundred Six Dollars ($3,417,406.00), consequential damages in the amount of Four-Hundred Twenty-Five Thousand Dollars ($425,000.00), general damages in the amount of Seven Million, Five-Hundred Thousand Dollars ($7,500,000.00) and punitive damages in the

amount of Four Million Dollars ($4,000,000.00), as is more fully set forth on the jury verdict form attached hereto and returned on August 1, 2002.

Accordingly, the Court does hereby **ORDER** that judgment be entered on behalf of the Plaintiffs, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., and against Defendants, A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., in the amount of Thirty-Four Million, Six Hundred Ninety-Six Thousand Dollars ($34,696,000.00), and the Court does hereby **ORDER** that judgment be entered on behalf of Hugh M. Caperton and against Defendants, A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., in the amount of Fifteen Million, Three-Hundred Forty-Two Thousand, Four-Hundred Six Dollars ($15,342,406.00), which said judgments shall accrue interest at the rate of 10% per annum until paid in full, and the Court does further **ORDER** that all statutory costs, including jury costs, be assessed against the Defendants, A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.

By agreement of the parties, this Order in no way affects any claims that Plaintiffs may have for attorney fees and/or costs, to which the Defendants object and will oppose, but precludes any and all

claims by the Plaintiffs to any additional prejudgment interest on the amounts reflected in the verdict, and in no way affects any right of the Defendants to object to any prejudgment interest already included in the verdict.

The Circuit Clerk is directed to send certified copies of this Order to counsel of record.

Entered this 15th day of August, 2002.

/s/
Honorable Jay M. Hoke, Judge

* * *

IN THE CIRCUIT COURT
OF BOONE COUNTY,
WEST VIRGINIA:

Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.,

PLAINTIFFS,

v.

Civil Action No. 98-C-192

A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.,

DEFENDANTS.

AMENDED
CIRCUIT COURT ORDER
ON
JURY AWARD OF PUNITIVE DAMAGES

WHEREAS, on June 30, 2004, this Court entered its original Circuit Court Order on Jury Award of Punitive Damages, which contained its findings of fact and conclusions of law in support of its ultimate rulings therein made, all of which were based upon a working copy of the of the Jury Verdict Form forwarded by facsimile transmitted copy to this Court from the original Jury Verdict Form taken from the original Court File in Boone County, West Virginia; and,

WHEREAS, on the morning of July 1, 2004, the Court recognized that, in relying upon the facsimile

copy of the Jury Verdict Form in calculating the awards in this case, it had made an inadvertent error in the listing of money damages amounts. Because of problems reading the facsimile copy, and apparent inconsistencies between multiple facsimile copies of the same Jury Verdict Form, this Court determined that it was just, necessary and proper to review the original Jury Verdict Form in the Clerk's Office of the Boone County Circuit Court to determine whether or not the Court's reading of the Jury Verdict Form was accurate; and,

WHEREAS, upon reviewing in person the original Jury Verdict Form in the Clerk's Office of the Boone County Circuit Court, the Court has determined that its earlier understanding of the money damages amount were misread, particularly that of misreading a "7" as what on the working copy of the Jury Verdict Form appeared to the Court to be a "2". Since the misread number, however, was in the millions of dollars (*i.e.* $7,000,000.00 misread as $2,000,000.00), the Court obviously must remedy this inadvertent error as soon as possible. But for this inadvertent error resulting from the one digit, and the limited effect that it has on the calculations of non-punitive damage amounts and ratios, there are no other substantive changes in the Court's previously issued order of June 30, 2004.

THEREFORE, the Court in light of all of the above does hereby issue this Order entitled Amended Circuit Court Order on Jury Award of Punitive Damages , as follows, for the express and limited purpose of remedying the previous inadvertent numerical error.

Introduction

On this the ____ day of _____, 2004, came the Court for the determination of certain issues related to the propriety, or lack thereof, in the Jury's ward of punitive damages for all of the Plaintiffs in this matter, and, against all of the named Defendants, given the requirements set out in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656 (1991). The Court has conducted numerous hearings and status conferences on these issues, with all parties present and having been represented by all counsel of record, as noted in the Court's file.

WHEREUPON, the Court takes note of the fact that it has had post-trial arguments from all of the respective parties; has received proposed orders from all of the respective parties; and has carefully and thoughtfully reviewed the Jury's Verdict, itself, in light of all of the points and authorities cited by all of the respective parties, particularly noting the recent decisions cited by the Defendants related to their arguments against the Jury's award of said punitive or exemplary damages founded upon the recent decisions (*i.e.* 2003) from the United States Supreme Court that came subsequent to this Jury's verdict in 2002. During the post-jury trial proceedings, the Court has also taken notice of the proceedings in the Virginia Supreme Court, together with those in the Federal Bankruptcy Court, where these same parties have been litigating, and in some respects continue to do so.

THEREUPON, after having considered all of such as well as recent litigation before the United States Supreme Court and the State Supreme Court, this Court has determined that the punitive damages issues are now ripe for a decision, given certain

recent determinations made in both of said forums on the issue of whether or not trial jury awards of punitive damages may or may not be set aside.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the entire record thus far generated, the Court does hereby make the findings of fact and conclusions of law as follows:

[1] That this Court continues to have statutory and Rule-based jurisdiction and venue over the subject matter and all of the respective parties hereto, based upon the Court's previous determinations on such, as well as the requirements flowing from our Supreme Court's holding in *Garnes v. Fleming Landfill, Inc.*, op cit, (1991). The Court further expressly concludes that *Garnes* and its progeny are consistent with the expressly applicable provisions of the West Virginia Constitution, Article III, S10, 13, and 17, and provides a separate and distinct ground for distinguishing this standard of review from that of the federal standard hereinafter discussed in depth; and,

[2] That in regard to the procedural history of this case, the Court notes that on August 1,.2002, after a seven (7) week trial, the jury in this case rendered a verdict in favor of the Plaintiffs on findings of tortious interference with contractual relations, fraudulent misrepresentation, and fraudulent concealment. Particularly, in its verdict, the jury awarded the following categories of damages to the Plaintiffs:

Compensatory (special and general) damages.	$40,613,406.00
Consequential Damages:	3,425.000.00

Punitive Damages: 6,000,000.00

TOTAL MONEY DAMAGES: $50,038,406.00

Therefore, after being instructed by the exact factors enumerated from the guidelines set out expressly, the Jury awarded the Plaintiffs Six Million Dollars ($6,000,000.00) in punitive damages and Forty-Four Million Thirty-Eight Thousand Four Hundred Six Dollars ($44,038,406.00) in other money damages, for a total award of Fifty Million Thirty-Eight Thousand Four Hundred Six Dollars ($50,038,406.00), producing thereby a non-punitive damages to punitive damages ratio of more than 7 to 1, *e.g.* the punitive damages were LESS THAN 1/8 of the total award of money damages; and,

[3] That the law of this State regarding such an award of punitive damages includes a two-step paradigm: (a) a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Probe*, 40 W.Va. 246, 22 S.E. 58 (1895); and (b) if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).'" Syl. Pt. 9, *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997) (emphasis in original) (quoting Sy. Pt. 7, *Alkire v. First Nat'l Bank*, 197 W.Va. 122, 475 S.E.2d 897 (1991). In *Garnes*, op cit, our Supreme Court of Appeals set forth the factors to be considered by a jury in assessing punitive damages. In direct reliance upon the holding in *Garnes*, this Court charged the jury as follows:

> Punitive damages should bear a Reasonable relationship to the harm that is likely to

> occur from the Defendants' conduct as well as the harm that has actually occurred . . . ;
>
> The jury may consider the reprehensibility of the Defendants' conduct. The jury should take into account how long the Defendants continued in this conduct; whether the Defendants were aware that their acts were causing harm; or likely to cause harm; whether the Defendants attempted to conceal or cover up their actions, or the harm caused by them; and, whether/how often the Defendants engaged in similar conduct in the past;
>
> If the Defendants profited from their harmful conduct, the punitive damages should remove the profit, and should be in excess of the profit, so that the award discourages future bad acts by the Defendants;
>
> As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages; and
>
> The financial position of the Defendants is relevant. (*see* Court's Jury Charge and Instructions of Law, at pp. 14-15); and,

[4] That as a element of the *Garnes* function, this Court is to review and consider the application of the enumerated factors considered by the jury. In addition to reviewing the factors set forth in the jury charge, this Court is to "consider the costs of the litigation, any criminal sanctions imposed on the defendant for the same conduct, any other civil actions against the same defendant based upon the same conduct, and the appropriateness of punitive damages to encourage fair and reasonable

settlements when a clear wrong has been committed." *Garnes*, Syllabus Point 4. Further, the Court is to examine the ratio of punitive damages to compensatory damages. With regard to the ratios of punitive damages to compensatory damages, the Supreme Court of Appeals has held that "[t]he outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional." *TXO Production Corp. v. Alliance Resources Corp.*, 186 W.Va. 656, 413 S.E.2d 897, Syllabus Point 4 (1992), *affirmed* 509 U.S. 443 (1993); and,

[5] That as both the Defendants and the Plaintiffs have respectively argued, in accordance with the United States Supreme Court's holding in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (referred to as State Farm hereinafter), the Court, focusing upon the factors enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (referred to as Gore hereinafter), is to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. (*see State Farm*, op cit, at 1524). In State Farm, the Court found the Defendant had been unconstitutionally punished by a state court jury for out-of-state malfeasance occurring over a 20-year period, much of it having no relationship to the dispute at issue; much of it admittedly lawful in the state where it occurred; where the Plaintiffs' counsel

framed the case as a platform for exposing and punishing State Farm for conduct beyond the scope of the Plaintiffs' claims; and where the Plaintiffs elicited expert opinion that State Farm likely would be punished in only 1 out of every 50,000 instances where it had been guilty of malfeasance. *Id.* at 1524-1525; and,

[6] That in regard to the factual circumstances that lay as the basis for the United States ruling in State Farm, juxtaposed to the factual circumstances presented before the Jury in this case, the Court notes that the evidence at trial was sufficient for a jury to conclude that the Plaintiffs were severely harmed by the conduct of the Defendants, as the corporate and individual Plaintiffs' mining business was destroyed, and the individual was precluded from working in the coal mining industry, thereby forcing the Plaintiffs into bankruptcy and further causing a loss of all rights in the reserves they formerly mined; and,

[7] That the Plaintiffs introduced the expert testimony of Mark Gleason who opined to a reasonable degree of accounting certainty that the Plaintiffs suffered damages exceeding $29 million as a result of the destruction of their business (Plaintiffs Trial Ex. 623), in response to which the Jury could reasonably determine that there was sufficient evidence to show that the Plaintiffs' damages was caused by Massey's tortious misconduct; and,

[8] That there was sufficient evidence from numerous witnesses, including the Defendants own witnesses, for the jury to determine that Defendants, through the actions of their officers, employees or agents, committed the civil wrongs of tortious

interference, fraudulent misrepresentation and fraudulent concealment (*see* Jury Verdict Form); and,

[9] That the Defendants have argued that as a matter of law the Jury's ward of punitive damages in the amount that it awarded such; on the factual basis upon which such punitive damages were awarded; and, on the legal basis upon which such punitive damages were awarded, all militate in favor of said award of punitive damages being set aside. The Court in further analyzing the factual components of this argument has determined that it is just and necessary to apply a Rule 50 analysis for such (*i.e.* Rule 50 of the West Virginia Rules of Civil Procedure). In light of the standards outlined by our Supreme Court, our Court has held that in reviewing the trial Court's determinations, it is the appellate Court's function to determine, not how it would have ruled, given the evidence presented, but whether or not the evidence was such that a reasonable trier of fact might have reached the same decision as the Jury did in the case before it [*see Alkire v. First National Bank*, 197 W. Va. 122 (1996), which was as well a punitive damages case; and see also the more recent case of *Ingram v. City of Princeton*, 208 W. Va. 352 (2000)]. In the more stringent analysis of a criminal case, our Supreme Court again has articulated the view that the Jury is the body to deliberate and determine such issues of fact. In the landmark cases of *State v. Guthrie*, 194 W. Va. 657, (1995) and *State v. La Rock*, 196 W. Va. 294 (1996), (note Syllabus Points 1 and 3, respectively) our Supreme Court directed that the inquiry is whether or not, after reviewing the evidence in the light most favorable to the prevailing party, "any rational trier of fact" could have found the essential elements of the crime charged by proof beyond a reasonable

doubt. In Guthrie our Supreme Court expressly stated that the reviewing Court "must credit all inferences and credibility assessments that the jury might have drawn in favor of the [prevailing party]. . . Credibility determinations are for the jury and not for an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which a jury could find [sufficient evidence]"; and, this Court finds that the evidence at trial was clearly sufficient for a jury to properly conclude that Defendants continued in their damaging conduct for an extensive period of time, even after litigation had been commenced; and,

[10] That this Court finds that the Plaintiffs also adduced evidence from its own witnesses, together with the Defendants' witnesses, which the Jury could reasonably conclude that Defendants' conduct was reprehensible, "evil" and self-serving. *Compare Radec, Inc. v. Mountaineer Coal Devel. Co.*, 210 W.Va. 1 (2000) (where jury awarded plaintiff punitive damages in an amount many times greater than its compensatory damages, the evidence of the defendant's "fraudulent conduct warranted the amount of punitive damages"; there, the defendant had induced plaintiff to rehabilitate the defendant's mine which the plaintiff had been mining with a false promise that the plaintiff could mine coal from another mine of the plaintiff's which would have been much more lucrative than the unprofitable rehab work; the evidence clearly showed that the defendant "knew" that the plaintiff "could not survive financially if it rehabilitated and mined" the first mine only, that the defendant would "benefit" from the plaintiff's rehab work, and that the defendant deceived plaintiff with its false promise in

order to reap such benefit, even though it never intended to follow through on its promise to have the plaintiff mine the profitable Drautz property; the Court found these actions were "'evil' and self-serving"). Here, for example, the Plaintiffs adduced the following evidence before the Jury, which was apparently sufficient for the Jury's determinations:

> (a) The Defendants' Chief Executive Officer, without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation (Wellmore hereinafter) threaten Harman with the declaration of "force majeure" under that Agreement;
>
> (b) The Defendants purchased United Coal Company with the intent to try to substitute the Harman coal sold to its long time customer LTV with the Defendants' coal produced in West Virginia;
>
> (c) During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defendants in place of Harman coal, the Defendants concealed this fact from Harman.
>
> (d) While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression that they were trying to sell Harman Coal to LTV.
>
> (e) The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV or other customers;

(f) At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened Harman and Mr. Caperton with long and protracted litigation in the event Harman did not agree to give up its rights to its reserves;

(g) Rather than tell Harman Mining of its efforts to sell the Defendants' coals and its lack of effort in selling Harman coal, the Defendant's representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed Wellmore to declare "force majeure" and effectively destroy the Plaintiffs' businesses.

(h) On December 1, 1997, at the Defendants' direction and contrary to recommendations of its management, Wellmore declared the occurrence of a "force majeure" event under a Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Harman by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss of business would be financially devastating to Harman;

(i) After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.

(j) The Defendants obtained confidential information at the meeting in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in Harman's assets;

(k) The Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;

(l) On December 1, 1997, the Defendants directed that Wellmore declare the occurrence of a "force majeure" event under a Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Harman by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss of business would be financially devastating to Harman;

(m) The Defendants had full knowledge that "force majeure" and concomitant reduction in the amount of coal Wellmore would accept under the Coal Supply Agreement would put Harman Plaintiffs out of business, including Plaintiffs Harman Development Company and Sovereign Coal Sales, Inc., both residents of and headquartered in West Virginia;

(n) The Defendants' declaration of "force majeure" was without any contractual basis as LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action;

(o) The Defendants misrepresented its intentions to settle any disputes between the parties through its reneged on its stated intention to purchase of Harman's assets, as and it collapsed the deal after Harman had shut down its operations in anticipation of a sale to the Defendants;

(p) The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded it was in its financial interest to do so; and

(q) The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

[11] That from this evidence and all the other evidence adduced at trial, in light of the points and authorities cited above, *e.g.* WVRCP Rule 50, *Alkire*, *Ingram*, *Guthrie*, and *La Rock*, this Jury, it being a rational trier of fact, had sufficient evidence before it to conclude that Massey's conduct was reprehensible, as our law defines such, and warranted the imposition of punitive damages in the amounts that such were assessed by the Jury for the conduct of the Defendants that had continued even after the initiation of this litigation; and,

[12] That even beyond the above referenced evidence, the Jury in this case also had before it evidence that Defendants stood to profit substantially from their wrongful conduct. The Defendants' own internal projections which projected

that Massey stood to make as much as $104 million in profit by mining Harman and certain adjoining reserves. (Plaintiffs' Trial Ex. 429.). Plaintiff also introduced evidence that the Defendants' sales to USX, LTV's alternate coke supplier, increased in 1998 after the closure of the Pittsburgh Works. Massey's revenues and income in 1998 were millions higher after Harman was put out of business. (Plaintiffs Trial Ex. 611.). *See Garnes, supra* ("If the defendant profited from his wrongful conduct, the punitive damages award should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant."). Through the destruction of Plaintiffs' businesses, the Defendants stood to gain additional, though not readily quantifiable, benefits by the elimination of a competitor and an increase in its market share; and,

[13] That in regard to the *Garnes* factor of the Defendants' financial position or status, the evidence adduced at trial before this Jury demonstrated that Massey was and is a large company. Massey's financial statements showed Massey generated between approximately $1 and $1.2 billion in annual revenues from 1997 to the present through the time of trial. (Plaintiff Trial Ex. 627.); and,

[14] That while the ratio of punitive damages to other damages may be supportive of a factor of 1, 3, 5 or possibly more, given the nature and extent of the evidence in a case, in this case the ratio of punitive damages to other damages (less than 1/7th) is well within the ratios considered reasonable by our Supreme Court of Appeals. The ratio of punitive damages to the compensatory and consequential

damages awarded to the Plaintiffs is less than one-seventh; and,

[15] That in regard to the *Garnes* factor related to the costs of litigation, the Court finds that the costs of litigation warrant the imposition of punitive damages. This factor is particularly supportive of punitive damages award in light of the evidence adduced regarding threats made by the Massey Defendants to Harman of protracted litigation. This case has been pending since 1998 and has been litigated in three (3) different court systems, including this Court in the State of West Virginia, the United States District Court for the Southern District of West Virginia, and the United States Bankruptcy Court for the Western District of Virginia, which does not include the contract action brought and litigated in the Virginia state court system, where they also did not prevail before the Virginia jury. The case was protracted in large measure by Massey's strenuous efforts to avoid this forum and prevent Plaintiffs from having their case heard by a West Virginia jury. In this Court, this case has generated significant pre-trial filings including motions to dismiss, motions to compel, motions for summary judgment and Motions in limine. Extensive litigation costs were incurred during pre-trial discovery and, the Court finds, Defendants' approach to discovery unduly caused extra legal work and expense. Lastly, in light of the nearly eight (8) weeks of jury trial that was conducted, there were extraordinary litigation costs that were incurred by all the parties; and,

[16] That from the Court's knowledge of the very extensive procedural history involved in this case, as well as its knowledge of the separate legal issues

involved in the other cases in other Court systems, this Court is not aware of any other civil or criminal proceedings against Defendants involving the this same conduct. In that respect, the Court took great pains to restrict, by issuing limiting or cautionary jury instructions at trial, or to eliminate, by the granting of various Motions in limine , during the numerous pre-trial proceedings the Jury's awareness or consideration of the other matters in litigation in the State of Virginia, in Federal Bankruptcy Court, or in this Court involving the facts and circumstances of other cases. Therefore, the possibility of duplicate awards is not represented in the punitive damages award in this case; and,

[17] That the Jury's award of punitive damages in this controversy, in their amount and in their extent, will help promote settlements in future matters of this type, especially where there is a disparity of bargaining power between the parties; and,

[18] That the Defendants expressed little interest in settling this matter on reasonable terms and instead appears to have settled on a strategy (consistent with the statements Mr. Blankenship made to Mr. Caperton in November 1997) designed to wear down the Plaintiffs and their counsel in the hope that eventually they would be unable to pursue this matter to a more favorable conclusion; and,

[19] That in regard to the other arguments regarding this Jury's award of punitive damages, particularly those of a constitutional dimension on State Farm and Gore, in this case, there was very substantial evidence from which a jury could properly find that Massey's conduct was reprehensible and, specifically, that the target of

Massey's misconduct had financial vulnerability, as Massey completely understood and knew; that the destruction of Plaintiffs' businesses was the known and intended result of Massey's tortious interference and fraud; that Massey's misconduct involved a series of bad acts taking place over many months; and that Massey repeatedly disregarded and interfered with Harman's rights and otherwise deceived Harman because of its strict adherence to cost-benefit analyses that concluded Massey would profit as a result of such misconduct. (*see State Farm*, op cit, at 1521); and,

[20] That in this case, as well, there are no "due process" concerns because the award of punitive damages was, by no stretch of the imagination, either "grossly excessive" or "arbitrary", *State Farm*, op cit, at 1519-1520 for a operative application of these elements; and,

[21] That from the evidentiary record and from the Court's rulings on the legal issues presented, there is no rational support for the argument that this case was not used as a platform to expose or punish perceived deficiencies in Massey's multi-state operations, nor did the Plaintiffs seek to submit substantial evidence regarding other incidents, bad acts or bad policy on the part of Massey. Any evidence that could have been adduced by the parties or considered by the Jury regarding other bad acts of Massey was: (a) limited in nature; (b) with cautionary or curative instructions; (c) or was largely in response to statements volunteered by Massey's CEO during his trial testimony and evidence; and,

[22] That while the Court is aware that it is improper for a jury in one state "to punish [a defendant] for conduct that was lawful where it

occurred and that had no impact on [the state where the jury is sitting] or its residents," *State Farm*, op cit, 1523-1524, citing *Gore*, 517 U.S. 559, 572-573 (1996), in this case Massey's misconduct occurred in substantial part in the State of West Virginia; was for the purpose of benefiting its West Virginia operations; and substantially injured residents of the State of West Virginia. While the breach of contract action occurred in the State of Virginia, it was litigated, the Jury awarded a verdict based upon that breach of contract ONLY; and it's appeal was processed in the State of Virginia ONLY. As the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the Jury's satisfaction that the torts occurred in the State of West Virginia. Therefore, it was the State of West Virginia's court system that had a legitimate interest in deterrence and punishment, if such torts were properly established before the Jury in West Virginia; and,

[23] That along those same lines of argument, the Defendants' argue that their tortious interference with Plaintiffs' contracts and business relationships would be lawful in Virginia, where Defendant A.T. Massey Coal Company, Inc. is headquartered, is not found by the Court to have substantial merit. Virginia law clearly recognizes a party can be found liable for money damages for the tort of tortious interference with a contract or business relationship. *Tazewell Oil Co., Inc. v. United Virginia Bank/Crestar Bank*, 243 Va. 94, 413 S.E.2d 611 (1992). While Virginia law, like West Virginia law, recognizes economic justification and self-interest as possible defenses for interference, such possible defenses require a factual determination as to whether the interference was

conducted through improper or wrongful means or methods, which the jury correctly rejected in this case based upon the evidence adduced at trial. To the extent any of Defendants' tortious conduct may have occurred in Virginia, Defendants have failed to provide any authority establishing that either Virginia or West Virginia bestows upon a parent corporation an absolute privilege to interfere with contracts or business relationships of its subsidiaries with third parties. Similarly, the tort of fraudulent conduct committed by Defendants is unlawful under Virginia law. Virginia recognizes a claim for fraud where there has been the knowing or intentional making of a false representation of a material fact, or a knowing and intentional concealment of facts, which has been reasonably relied upon by another party resulting in injury to the misled party. *Bay Point Condo. Assn. v. RML and Dryvit*, 2001 WL 792690 (Va. Cir. Ct.); *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998); *Ashmore v. Herbie Morewitz, Inc., et al.*, 252 Va. 141, 475 S.E.2d 271 (1996); and,

[24] That based upon the Court's understanding of the operative elements of those torts, the evidence adduced by the Plaintiffs at trial would clearly have established those elements as well. Nevertheless, while the torts alleged by the Plaintiffs may be the same or similar as a matter of law in Virginia as in West Virginia, the Defendants were found in this action to have committed the torts in the State of West Virginia, juxtaposed to the State of Virginia. In that the Defendants' conduct is unlawful in both Virginia and West Virginia, and that the award of punitive damages to the Plaintiffs is NOT a factor of seven, but is less than one-seventh (1/7) of the non-punitive damage award, the punitive damage award

is obviously neither arbitrary, grossly excessive, nor in violation of the Defendants' due process rights (*see State Farm*, op cit, at 1519-1520); and,

[25] That in light of the Defendants' arguments based upon the United States Constitution, particularly the *State Farm and Gore* "due process" concepts in analyzing a trial court's award of punitive damages, this Court has as well reviewed historical attempts by such defendants, against whom a trial jury has awarded punitive damages, to utilize certain provisions of our West Virginia Constitution as grounds for the appeal of such a punitive damage award. In that respect, this Court has reviewed and considered Constitution Article III, Sections 10, 13 and 17, in that they in para materia have "due process of law" and "right to trial by jury" concepts equally applicable to these arguments that have been articulated on federal constitutional grounds. Within the context of violation of "due process" from the State's perspective, Sections 10, 13 and 17 in seriatim may be set forth as follows:

> Section 10. No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.
>
> Section 13. In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interests and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be reexamined in any case than according to rule of court or law.
>
> Section 17. The courts of this State shall be open, and every person, for an injury

> done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or denial.

[26] That this Court is well aware that our Supreme Court has traditionally held that in due process or equal protection concepts from Section 10, in particular, that the scope and application of these protections are coextensive or broader than that of the Fourteenth Amendment to the United States Constitution, which lies as the basis for the *State Farm* and *Gore* holdings [*i.e.* see our Supreme Court's treatment of such issues in *Payne v. Gundy*, 196 W. Va. 82(1996)]; and,

[27] That following the Court's recent inquiries into whether or not these West Virginia constitutional grounds have been utilized successfully by any defendant arguing against a jury award of punitive damages, the Court has been unable to ascertain any decision by our Supreme Court that has ruled in favor of any such defendant, when the trial court has properly charged the trial jury by the giving of an instruction of law based upon the enumerated factors set out in the *Garnes* case. This Court has determined as a matter of fact and law that it did so charge the Jury properly in regard to the articulated *Garnes* factors. Moreover, the Court believes from the Jury's deliberations and the verdict that it returned awarding less than one-eighth (1/8) in punitive money damages, *e.g.* approximately $44 Million in non-punitive damages juxtaposed to $6 Million in punitive damages, that the Jury properly applied its *Garnes* instructions to the relevant facts of this case. As a result of the above determinations on the federal standard from

State Farm and *Gore*, the Court has correspondingly determined that there are no such "due process" violations on the State constitutional grounds from Sections 10 and 17. Moreover, such West Virginia constitutional grounds, when combined with the "right to jury trial" and "right to remedy" constitutional guarantees from Sections 13 and 17, actually militate in favor of the Plaintiffs, and not the Defendants in this case; and,

[28] That as a result of all of the findings and conclusions set forth above, the Court has expressly determined that it is just and reasonable, as well as equitable and necessary, to DENY the Defendants' Motion to Set Aside the Punitive Damages Award and to CONFIRM AND AFFRIM the Jury's Verdict which awarded $6,000,000 in punitive damages against the Defendants; and,

[29] That as a result of the Court's respective findings of fact and conclusions of law, the Court notes the objections and exceptions of both the Plaintiffs and the Defendants for the record in this matter.

All of which is hereby ORDERED, ADJUDGED and DECREED.

It is further hereby ORDERED, ADJDUGED and DECREED that the Clerk of this Court shall provide notice of the entry of this Order by forwarding a certified copy of the same upon all of he parties of record herein, through counsel as appropriate, in accordance with the applicable provisions of Rules 10.01-12.06 of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested; by hand delivery; or, by facsimile transmission.

ENTERED on this the 27th day of August, 2004, A.D.

/s/
CHIEF JUDGE

**IN THE CIRCUIT COURT
OF BOONE COUNTY,
WEST VIRGINIA**

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Plaintiffs,

v. Civil Action No. 98-C-192

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC.,

Defendants.

FINAL ORDER:
Denying Defendants' Rule 50(b) Motion for Judgment As a Matter of Law; Rule 50(c)/59 Motion for New Trial, or in the Alternative, Motion for Remititur

Procedural Posture

On the 8th Day of November, 2004, this Court issued a *Procedural Order* in which the Court invited the Parties to submit within ten (10) days any requests for further hearing or to submit any and all additional arguments or information as may be relevant in the Court's review of Defendant's *Motion*

for Judgment as a Matter of Law, Motion for New Trial or, in the Alternative, Motion for Remittitur. Within ten (10) days from the entry of said *Procedural Order*, the Defendants corresponded to the Court that they had no further arguments or information they wished to submit for the Court's consideration. Collectively, the Plaintiffs submitted Notices withdrawing their post-trial *Motions for an Award of Attorneys' Fees.*

WHEREUPON, the Court noted that it now appears that this Court is in a procedural posture to render a decision and issue the following Order in this matter, given the substantial amount of time that has passed since the jury returned its verdict after an approximately seven (7) week trial on or about August 1, 2002, A.D. The Court thereafter entered its Judgement Order on or about August 15, 2002, A.D., followed by this Court's entertainment of numerous *Garnes*-based post-trial pleadings; memoranda submitted in support of and in opposition to the jury verdict's on punitive damages; subsequent arguments and hearings; and, the Court's receipt of submitted proposed and recommended findings and conclusions. At the conclusion of all of which, the Court rendered its Order affirming the jury verdict's determination of punitive damages on or about June 30, 2004, with the Court entering an *Amended Order on Jury Award of Punitive Damages*, on or about August 27, 2004, ending approximately two years of litigation in the post-trial posture. During which time, the Court reviewed and considered all of the pleadings; responsive pleadings; arguments; responsive arguments; proposed dispositions; responsive proposed dispositions; followed by objections to the

respective responsive dispositions; rebuttal to the objections and sur-rebuttal to the objections.

THEREUPON, with the withdrawal of Plaintiffs' *Post-Trial Motions for Attorneys' Fees*, the Court was clearly under the impression that all post-trial litigation elements were completed by the respective parties and were properly before the Court, particularly following the Defendants' notice by correspondence dated November 24, 2004, that they would not be submitting any further matters for the Court's review, thereby allowing the Court to complete its post-trial review and consideration of the remaining non-*Garnes* issues.

WHEREUPON, contrary the Court's understanding of the post-trial procedural posture of this matter, and the Court's first attempt at the drafting and entry of an acceptable "Final Order" in this matter, the Court has continued to receive post-trial submissions from the respective parties hereto through January and February, 2005, with the most recent submission being dated February 14, 2005, A.D.

THEREUPON, the Court upon its review and its consideration of all of the post-trial submissions in this matter, irrespective of whichever party hereto may have made the submission, has now determined that anything and everything that could be meaningfully submitted to this Court has been submitted, with the Court's corresponding determination that the process of continuing to submit and respond, object and rebut, re-object and sur-rebut, does not serve the interests of justice, nor of these parties. As a result of all of the above, including the other dispositions that have been made in the other respective forums, the Court does hereby

expressly determine that this matter is now ripe for a decision.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH including the entire record thus far generated, the Court does hereby make the following findings of fact and conclusions of law:

[1] That this Court continues to have statutory and Rule-based jurisdiction and venue over the subject matter and all of the respective parties hereto, based upon the Court's previous determinations of such, and in light of the applicable provisions of Rules 50(b) and (c), as well as 59 of the *West Virginia Rules of Civil Procedure*, and the respective authorities cited herein; and,

[2] That in considering the bases of these *Motions* filed by the Defendants and the responses thereto by the Plaintiffs, the Court outlines the following analysis of the procedural aspects of the Rules at this posture of the case:

[a] In considering a Rule 50(b) motion for judgment as a matter of law (judgment notwithstanding the verdict), it is well settled law that the Court must consider the evidence in the light most favorable to the non-movant, giving the non-movant every reasonable and legitimate inference arising from the testimony, and must assume as true those facts which the jury may properly find under the evidence. *See Lambert v. Goodman* 147 W. Va. 513 (1963), which was the basis for the old rule, and such cases as Syllabus Point 2, *Brannon v. Riffle*, 197 W. Va. 97 (1996) decided under the present rule.

[b] In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Syllabus Point 4, *Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000); Syllabus Point 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). Within this context, the same tenor is founded as well in criminal cases, where an even higher burden of proof, *i.e.* beyond a reasonable doubt, is required. As our Court ruled in the landmark case of *State v. LaRock*, 196 W. Va. 294 (1996), when a [Defendant] undertakes a sufficiency challenge, all of the evidence, direct and circumstantial, must be viewed from the [opposing party's] coign of vantage, and the viewer must accept all reasonable inferences from it that consistent with the jury's verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the [prevailing party's] favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the [prevailing party's] theory. Syllabus Point 2, *op cit. LaRock*'s foundation in this analysis came from the Court's previous year's *State v. Guthrie*, 194 W. Va. 657 (1995), where our Supreme Court held in Syllabus Point 3:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all of the

> evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

[c] In considering a Rule 59(a) motion for a new trial, the trial court's conclusions as to existence of reversible error are reviewed under an abuse of discretion standard, and the underlying factual findings are reviewed under a clearly erroneous standard, *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W. Va. 145, 148. The distinction between the effect of entering a judgment notwithstanding the verdict as opposed to granting a new trial is substantial and, thus, warrants a different standard of review. *Gonzalez v. Conley*, 199 W. Va. 288 (1997). It is error to treat the two (2) motions pursuant to the same standard. In a motion for judgment as a matter of law, it is improper for the trial court to invade the jury's function by weighing the evidence and considering the credibility of the witnesses, while when considering a motion for new trial, the trial judge may weigh the evidence and consider the credibility of the witnesses. *Gonzales v. Conley, op cit.* If the trial court finds that the verdict

is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the trial court may set aside the verdict. *See, e.g., Witt v. Sleeth*, 198 W. Va. 398, 481 S.E.2d 189 (1996).

[d] In considering a Rule 59(e) motion to alter or amend the judgment (Defendants' *Motion for remittitur*), it is extremely important to note that a trial court may not enter a new judgment in an action where, as here, there has been a trial by jury. *Williams v. Charleston Area Med. Ct., Inc.*, 215 W. Va. 15, n. 3 (2003) ("[Plaintiff's] motion also requested the circuit court to alter or amend the judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Since the trial below was by jury, this was not a proper request.") For this reason, Defendants' Rule 59(e) motion should be DENIED as a matter of law, but the basis of that *Motion* should correspondingly be considered within the parameters of the other Motions, which the Court so does by the following; and,

[3] That within a synoptic view of the evidence adduced in this seven (7) week trial, from the Court's review of the relevant evidence within the analytical framework established by the standards set out above, it is clear there was sufficient and credible evidence from numerous witnesses, including the Defendants' own witnesses, for the Jury to determine that Defendants, through the actions of their officers, employees or agents, committed the civil wrongs of tortious interference, fraudulent misrepresentation and fraudulent concealment. The Court detailed a portion of this evidence in the "Findings and Conclusions" section of its *Amended Circuit Court Order on Jury Award of Punitive Damages*, which

the Court approves, adopts and incorporates herein as though specifically set forth; and,

[4] That in considering the evidence either in the light most favorable to the non-moving parties, in accordance with the Defendants' Rule 50(b) *Motion*, or in weighing the evidence and considering the credibility of the witnesses, in accordance with the Defendants' Rule 59 (a) *Motion*, the weight of the evidence at trial fairly established and was clearly sufficient for the Jury to conclude the following.

[a] The Corporate Plaintiffs (collectively "Harman") formerly were in the business of mining and selling high quality metallurgical coal produced from the Harman Mine. The Defendants (collectively "Massey") are also in the business of mining and/or selling metallurgical coal. Harman and Massey were competitors.

[b] Massey desired, among other things, to gain LTV Steel Corporation ("LTV") as a new customer.

[c] For years, LTV had purchased substantial amounts of metallurgical coal from United Coal Company ("UCC"). The coal that LTV preferred and purchased from UCC was a premium blend of Harman coal and other, lesser quality coals (the "UCC/Harman Blend"). Coal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV.

[d] For many years, Harman sold all of its coal to one of UCC's subsidiaries, Wellmore Coal Corporation ("Wellmore"), which was, in turn, supplied to LTV as part of the UCC/Harman Blend. During the relevant time period, Harman had a long-term coal supply agreement with Wellmore. Harman

was almost exclusively reliant on that contract. Wellmore's management had always encouraged Harman to mine and sell to it as much coal as it possibly could. Harman had been supplying Wellmore with its high quality metallurgical coal on a continuous basis for many years.

[e] For years, Massey wanted the LTV business and tried to increase sales of coals from its production sources ("Massey Mines") to LTV, but with little success. So Massey chose to acquire UCC in order to eliminate a competitor and to gain more access to LTV, but fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend. In a document written prior to Massey's purchase of UCC, Massey characterized the situation as follows:

> In layman's terms, the UCC metallurgical coal quality is equivalent to Massey's premium Marfork coal, but is further enhanced by having a higher inerts level and a lower sulfur content. UCC had achieved a particularly enviable supplier relationship with LTV Steel Corporation ("LTV") that has now been in place for over 10 years. Surprisingly, the LTV relationship is not secured by a long-term contract, but rather by annual purchase orders that are consistently renewed at favorable pricing levels because of LTV's high regard for the UCC coal quality.
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> ***
>
> UCC's decree of dependence on the Harman mining coal is obviously a sensitivity, since that source represents about 40% of the annual shipment level at Wellmore No. 7,

and has become a fairly critical ingredient in the LTV coal blend. The term of the Harman mining purchase commitment runs through the year 2001. (Plaintiff's Ex. 27A: "Acquisition of United Coal Company, Overview.")

[f] Massey knew that there were risks associated with its acquisition. In a pre-acquisition document assessing those risks, Massey stated, "The most significant risk associated with this transaction is that the plus-10-years-old supplier relationship between LTV and UCC may not continue under Massey ownership."

[g] In that same document, however, Massey noted that it would enjoy a very favorable economic outcome if it could cause LTV to purchase coal from Massey Mines, instead of the UCC/Harman Blend, at the price LTV was paying for UCC/Harman coal.

[h] Recognizing that Harman coal was a critical ingredient in the coal blend that LTV preferred, and knowing that LTV in the past had chosen not to purchase much coal from Massey, Massey nonetheless went ahead and purchased UCC. Further, recognizing that "LTV is extremely reluctant to change a long-established, successful coal blend", Massey nonetheless went ahead and marketed coals from Massey Mines to LTV to replace the Harman blend that LTV preferred.

[i] Massey provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract, despite the fact that, historically, LTV preferred multiple suppliers and did not utilize multi-year,

long-term coal supply contracts. The price that Massey quoted for it is coals to LTV constituted a "handsome improvement" over the prices it had been receiving for its coals.

[j] Massey's marketing strategy resulted in a loss of the LTV business – a risk that it fully appreciated, acknowledged and understood prior to its marketing efforts and even prior to its purchase of UCC. Only after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "force majeure" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "force majeure", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

[k] After Harman shut down operations, Massey took a series of steps to prevent Plaintiffs, both corporately and personally, from pursuing legal remedies arising out of Massey's misconduct. Massey's CEO threatened the Plaintiffs not to undertake legal action. Massey offered to purchase the assets of Harman at a distressed sale price.

Massey then delayed and ultimately collapsed the transaction in such a manner so as to increase the Plaintiffs' financial distress. Instead, utilizing confidential information obtained from Plaintiffs for the alleged purpose of negotiating a settlement of their disputes, Massey purchased a narrow band of coal reserves surrounding much of the Harman Mine for the purpose of making Harman unattractive to others and to decrease its value to all but Massey, and Massey planned to acquire Harman in the long run.

[l] Many of the steps Massey took were directed at Plaintiff Caperton personally, including, by way of example, the following:

> [i] Massey's conduct in "negotiating" directly with Caperton and under the February 9, 1998 letter agreement: Massey submitted a letter agreement to Mr. Caperton as President of Sovereign and Harman in which Massey and Wellmore expressly agreed to "pursue good faith negotiations toward concluding the described transactions." The transaction described in the agreement was intended to settle all issues relating to 1997 Coal Supply Agreement between the parties and permit Massey to acquire Caperton's interest in the Corporate Plaintiffs.
>
> [ii] Massey's conduct in negotiating a letter of intent with Grundy: In the letter of intent, Massey agreed to purchase the note held by Grundy. Massey entered into the letter of intent with Grundy with full knowledge of

Caperton's personal guarantee on the Grundy note.

[iii] Massey's conduct affecting Caperton's Terra obligations: Knowing Caperton's personal responsibilities for reclamation obligations to Terra, Massey agreed to replace the Terra reclamation bond with a Massey bond. During negotiations, Massey internal documents reflect that Caperton's personal guarantees were discussed and, as consideration for the transaction, the parties specifically negotiated the release of "his personal guarantee obligations." Recognizing Caperton's personal interest in the negotiations, Massey required Caperton to be a signatory to the closing documents, sought a far-reaching release from Caperton personally, and agreed to give Caperton a personal release in return.

[iv] Massey's duty to mitigate based upon knowledge of Caperton's actions taken in detrimental reliance: Massey knew through confidential information exchanged during the December 1997 and January 1998 discussions with Caperton, about Caperton's plans to shut down Harman as a result of Massey's wrongful declaration of "force majeure". Massey further knew that, in reliance upon an agreement in principle reached concerning the key terms and a proposed closing date of January 31,

> 1998. Caperton intended to shut down Harman's operations on January 19, 1998. Massey was also aware of the impact Massey's failure to close as planned would have on Caperton personally (based on his personal guarantees, likely AVS violator listings, etc.). Unknown to Caperton, Massey made an internal decision *not* to close the transaction by the agreed-to date of January 31, 1998, but chose instead to let Caperton move forward with his plans based upon his mistaken belief concerning the closing date.

[5] That as noted hereinabove from *State v. Guthrie*, *op cit*, the Court in reviewing not only sufficiency issues, but credibility claims as well, notes that Guthrie requires that:

> An *appellate court must* review all of the evidence, whether direct or circumstantial, in the light most favorable to the [non-moving] party and *must* credit all inferences and credibility assessments that the jury might have drawn in favor of the [non-moving party]. Emphasis supplied.

[6] That in applying this standard, not only this Court but our Supreme Court is required to view all of the credibility of witnesses' issues consistent with the prevailing party's theories, in that the Jury could have properly found that many of the witnesses testifying on behalf of the Defendants were wholly lacking in credibility. For example, despite the fact that Massey denied an intent to interfere with Harman or to purposely cause financial distress for the Plaintiffs so that Massey would benefit in the

long run, numerous pieces of documentary evidence authored by Massey belied that testimony; and,

[7] That in review of the particular theories by the Plaintiff, the Court will review and consider them *in seratim*, as follows:

A. Tortious Interference

[8] Defendant's Rule 50(b) argument that Defendants could not have tortiously interfered with the Harman Plaintiffs and individual Plaintiff Caperton's advantageous business relationships is not supported by the law or the evidence of record at trial. To establish prima facie proof of tortious interference, Plaintiffs needed only to show (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. *See, e.g.*, Syllabus Point 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1983); and,

[9] The evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation. As for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds (and resulting listing on the Applicant Violator System, or "AVS"), and his personal relationship with United Bank. Further,

the evidence was clearly sufficient for the Jury to conclude that Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.

(a) For example, Massey tried to persuade LTV to buy its coals in place of Harman coal, used "force majeure" and other threats, and otherwise interfered with Harman's contractual relations for the purpose of placing the Plaintiffs, corporately and personally, in great financial distress in order to have Harman, not Massey, bear the cost of Massey's failed marketing strategy with LTV.

(b) For example, Massey directed Wellmore to declare "force majeure" as a result of Massey losing LTV's business due to Massey's failed marketing attempts.

(c) For example, after directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and with Penn Virginia Coal Company, the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.

(d) For example, after directing the declaration of "force majeure", the Defendants dealt directly with Grundy National Bank pursuant to notes held

by Grundy, for which Plaintiff Caperton had given his personal guaranty;

(e) For example, the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help to insure that Harman would only be valuable to the Defendants;

(f) For example, the Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses and caused Plaintiff Caperton's resultant AVS listing because, after conducting cost-benefit analyses, the Defendants concluded that it was in the Defendants' financial interest to do so;

(g) For example, Defendants presented evidence to the Jury in support of their claim that their conduct was privileged, and the Court instructed the Jury that it could consider whether Defendants proved their interference resulted from legitimate competition; that their interference resulted from Defendants' having a financial interest in the induced party's business; that Defendants' interference resulted from

their having responsibility for another's welfare; that Defendants' interference resulted from their intention to influence another's business policies in which Defendants had an interest; that Defendants' interference resulting from their giving of honest, truthful requested advice; or "other factors which show that Defendants' interference was proper." *Court's Charge and Instruction of Law*, at 8-11;

(h) The Defendants employed wrongful means including the following by way of example: The "business justification" defense is subject to the condition that the actor not employ wrongful means, that our Supreme Court has held that a determination of whether conduct is proper or wrongful suggests a review of the factual situation and the factors listed at section 767 of the *Restatement (Second) of Torts*. *C.W. Development, Inc. v. Structures, Inc. of W. Va.*, 185 W. Va. 462, 465 (1991);

(i) The Court instructed the Jury to consider the various factors listed at section 767 in the context of the totality of the facts and circumstances of this case;

(j) That the evidence was clearly sufficient for the Jury to conclude that:

[i] Defendants developed a plan to interfere with Plaintiffs' existing and prospective relations with

Wellmore before A.T. Massey Coal Company acquired Wellmore.

[ii] Massey acquired UCC with the purpose of gaining access to LTV and to have the ability to interfere with the supply of Harman to LTV.

[iii] The Defendants' Chief Executive Officer (CEO), without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation ("Wellmore") threaten Plaintiffs with the declaration of "force majeure;"

[iv] At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened the Corporate Plaintiffs and Mr. Caperton with long and protracted litigation in the event the Corporate Plaintiffs did not agree to give up the rights to their reserves;

[v] At the November, 1997 meeting the Defendants obtained confidential information and, thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would

help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;

[vi] Massey engaged in a cost-benefit analysis to determine whether it should direct Wellmore to declare "force majeure";

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "force majeure" event under the Coal Supply Agreement, which reduced Welhnore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

[viii] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

[ix] The Defendants misrepresented their intention to settle any disputes between the parties through an offered purchase and sale of Harman assets, and

instead delayed the transaction and then reneged on their stated intention to purchase the Harman assets by collapsing the deal after the Harman operations were shut down in anticipation of the sale;

[x] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and

[xi] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

(k) That Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Officer, Donald Blankenship, and not by Wellmore or any of its corporate officers;

(l) That Defendants, not Wellmore or any of its corporate officers, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing

in the Bankruptcy Court and to have Caperton removed as the debtor-in-possession;

(m) That Defendants took numerous specific steps pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore.

(n) That, as a matter of law, the circumstances under which a corporate parent has a legitimate justification or privilege to interfere in the contractual relations of its subsidiaries are qualified, subject to factual analysis by the jury, and the justification or privilege is lost if the corporate parent engages in wrongful conduct;

(o) That, as outlined above, there was substantial evidence for the Jury to conclude that Defendants' conduct was wrongful;

(p) That additional, substantial evidence of improper motive presented to the Jury included that, on August 1, 1997, one day after the acquisition of United Coal (the parent company of Wellmore), Wellmore's management recommended the purchase of Harman's entire production for the following year, but that Defendants' CEO, Donald Blankenship, overruled this recommendation and directed Wellmore to refuse to purchase more than the

minimum tonnages because of a purported "force majeure", that four days later, after having enacted Blankenship's directive, Blankenship put Wellmore up for sale in September of 1997;

(q) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice;

(r) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' claims for tortious interference and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. *Williams v. Charleston Area Medical Center*, 215 W.Va. 15 (2003).

B. Fraudulent Misrepresentation

[10] That the Defendants' Rule 50(b) argument that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims of fraudulent misrepresentation is not supported by the law or the evidence of record at trial. "The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and (3) that he was damaged because he relied on it." *Horton v. Tyree*, 104 W. Va. 238, 242, (1927), as cited in Syllabus Point 1, *Lengyel v. Lint*, 167 W. Va. 272

(1981). The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance.

(a) That, by way of example, the following evidence was presented to the Jury:

[i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;

[ii] In declaring "force majeure", Wellmore was directed by the Defendants' senior management to claim that the supposed event of "force majeure" was unforeseen, when Massey was well aware of and had in fact foreseen the event at least seven months before it occurred;

[iii] In declaring "force majeure", Wellmore was directed by Defendants' senior management to claim that a coke facility had shut down, when Defendants knew it had not;

[iv] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and

the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

[v] The Defendants obtained confidential information at a meeting in November, 1997, in West Virginia and thereafter on the purported promise to purchase Caperton's interest in the Harman assets,instead used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;

[vi] The Defendants misrepresented their intentions to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;

[vii] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants

concluded that it was in their financial interest to do so; and

[viii] The Defendants' consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to Defendants' advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

(b) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and

(c) The the Jury verdict form and the instructions to the Jurors on the issue of Plaintiffs' claims for fraudulent misrepresentation and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. *Williams v. Charleston Area Medical Center*, 215 W. Va. 15 (2003).

C. Fraudulent Concealment

[11] That the Defendant's Rule 50(b) argument that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims of fraudulent concealment is not supported by the law or the evidence of record at trial. As stated above, "The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced

by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and (3) that he was damaged because he relied on it." *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927), as cited in Syllabus Point 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E. 2d 66 (1981). A claim of fraudulent concealment "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Pocohantas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998). The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently concealed material information which they were under a duty to disclose, that Defendants were motivated to conceal material information and prevent the Plaintiffs, both personally and corporately, from discovering the information, and that Plaintiffs, both personally and corporately, were damaged because of Defendants' concealment.

(a) That, by way of example, the following evidence was presented to the Jury:

[i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;

[ii] During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defendants in place of Harman

coal, the Defendants concealed this fact from Plaintiffs;

[iii] The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV;

[iv] The Defendants purposely omitted to disclose the fact that it lost the LTV business, which it lost not because of any "force majeure" but because of Defendants' marketing strategy and dealings with LTV, particularly its insistence that LTV fill all of its coal requirements through Defendants' West Virginia operations via a sole supplier, long-term contract, and through its decision not to allow LTV to purchase Harman coal, LTV's preferred choice;

[v] Rather than tell Plaintiffs of its efforts to sell the Defendants' coals and its lack of effort in sellin Harman coals, the Defendants' Representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed Wellmore to declare "force majeure" and effectively destroy the Plaintiffs' businesses.

[vi] At a November, 1997 meeting the Defendants obtained confidential information and thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "force majeure" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

[viii] After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately

and personally, in greater financial distress;

[ix] The Defendants' declaration of "force majeure" was without any contractual basis as Defendants knew LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action, but instead was intended to place additional economic pressure upon the Plaintiffs, both corporately and personally;

[x] The Defendants obtained confidential information at a meeting in November, 1997, in West Virginia and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, instead used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;

[xi] The Defendants concealed their true intention not to settle any disputes between the parties and reneged on its stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down

operations in anticipation of a sale to the Defendants;

[xii] The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and

[xiii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

(b) That there was sufficient evidence to support a finding of a duty by Defendants to disclose the information concealed from Plaintiffs, both corporately and personally, including, for example, the submission of a letter agreement dated February 9, 1998, to Caperton, in both his personal and corporate capacities, agreeing to "pursue good faith negotiations toward concluding the described transactions", and that the Defendants concealed their true intention at that time not to settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after

Plaintiffs had shut down operations in anticipation of a sale to the Defendants;

(c) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and

(d) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' claims for fraudulent concealment and Defendants' defenses thereto allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. *Williams v. Charleston Area Medical Center*, 215 W. Va. 15 (2003).

[12] That on those issues related to the Defendants' challenges to the Jury's award of compensatory, consequential and general damages as set out in the Jury's *Verdict Form*, which damages for the destruction of an established business is the difference between the fair market value of the business before and after its destruction." Syllabus. Point 3, *Rufus v. Lively*, 207 W. Va. 436 (2000), As for the Plaintiff Caperton, "An individual cause of action can be asserted when the wrong is both to the shareholder and the corporation." 13 William Meade Fletcher, et al., Cyclopedia of the Law of Private Corporations sec. 5911 (2000). As for Defendants' claims that the damages awarded were excessive, our Supreme Court has held that:

> In reviewing challenges to damages awards generally, a deferential standard is employed: "in the absence of any specific

> rules for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict . . . ." This judicial hesitance stems from the "strong presumption of correctness assigned to a jury verdict assessing damages." Accordingly, "[a] jury verdict . . . may not be set aside by the trial court merely because the award of damages is greater than the trial judge would have made if he had been charged with the responsibility of determining the proper amount of the award."

Kessel v. Leavitt, 244 W.Va. 95, 511 S.E.2d 720 (1998)(citations omitted). In fact, as noted above, in considering a Rule 59(e) motion to alter or amend the judgment (Defendants' motion for remittitur), a trial court may not enter a new judgment in an action where, as here, there has been a trial by jury. *Williams v, Charleston Area Med. Ctr., Inc.*, 215 W.Va. 15, n.3, 592 S.E.2d 794, 798 (2003) ("[Plaintiff's] motion also requested the circuit court to alter or amend the judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Since the trial below was by jury, this was not a proper request.").

(a) That, by way of example, the following evidence was presented to the Jury:

[i] Corporate Plaintiffs introduced testimony through a number of witnesses and introduced evidence through a number of exhibits, including the expert testimony of Alan Stagg who opined to a reasonable degree of professional

certainty regarding the business plan put into place when Caperton took over the business in 1993 and who provided a valuation of the Harman coal reserves, and of Mark Gleason who opined to a reasonable degree of accounting certainty that the Corporate Plaintiffs suffered damages exceeding $29 million as a result of the destruction of their business, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Corporate Plaintiffs' damages were caused by Defendants' tortious misconduct;

[ii] That Plaintiff Caperton introduced evidence through testimony on his own behalf, through his expert Daniel Selby, who opined to a reasonable degree of accounting certainty, through the testimony of Bobby Reece, an executive at Grundy National Bank, and through the introduction of exhibits all establishing his individual injuries, including injury to his personal and professional reputation resulting in the loss of income, benefits and business opportunities, personal injury by way of lost earnings and employment opportunities by way

of his listing on the AVS, and personal injury by way of Defendants' tortious interference with his personal guaranty obligations in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff Caperton's damages were caused by Defendants' tortious misconduct. Such evidence included, but was not limited to:

[iii] The Plaintiff Caperton was a business leader with whom his lenders and vendors were willing to do business before Defendants' tortious conduct;

[iv] The vendors and lenders with whom Plaintiff Caperton had previously done business now refuse to do business with him due to Defendants' tortious conduct;

[v] Due to the Defendants' tortious conduct, Plaintiff Caperton became a defendant in several lawsuits brought against him personally by the lenders and vendors with whom he had previously enjoyed a beneficial relationship;

[vi] Due to the Defendants' tortious conduct, Plaintiff Caperton has had judgments and tax liens entered against him personally

throughout the State of West Virginia;

[vii] Due to the Defendants' tortious conduct, Plaintiff Caperton's personal credit rating and creditworthiness have been destroyed;

[viii] Due to the Defendants' tortious conduct, Plaintiff Caperton was and is precluded from obtaining a mining permit and engaging in his livelihood as a result of his AVS listing;

[ix] The Plaintiff Caperton's AVS listing, according to testimony at trial by those in the mining industry, constitutes a "blackball";

[x] Due to Defendants' tortious interference, Plaintiff Caperton's personal annual income went from in excess of $1.3 million to $60,000.00;

[xi] The Defendants' invaded Plaintiff Caperton's personal privacy, including the unwarranted trespass on his personal real estate to photograph his personal residence, and due to Defendants' tortious conduct, Plaintiff Caperton has suffered mental anguish and sleepless nights.

(b) That the cases cited by Defendants for the proposition that Caperton was not entitled to recover damages for his

separate personal injuries actually support the Court's conclusion of law: in that respect, the case of *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Fin. Corp.*, 463 F. Supp. 666 at 671, wherein the federal Court held... "a stockholder may sue to redress 'direct' injuries to himself regardless of whether the same violation injured the corporation". *See also Sharp Electronics Corp. v. Yoggev*, 1995 WL 263533 (1995), wherein the Pennsylvania Court held: "If the harm he sustained due to Sharp's conduct is not derivative of the harm DBI suffered at Sharp's hands, Yoggev can maintain suit for injuries sustained by him as a result of Sharp's tortious acts.". In the U.S. Eight Circuit case of *Taha v.Engstrand*, 987 F.2d 505 at 507 (1993) the Court held "Recovery is available, naturally, when the defendant owes an individual shareholder ... a special duty, or when the individual suffered an injury separate and distinct from that suffered by other shareholders ...." *See also Mullins v. First Nat'l Exchange Bank of Va.*, 275 F. Supp. 712 at 721-22 (E.D. Va. 1967), recognizing the same theory.

(c) That from the record and the matters referenced herein, it is clear that there was sufficient evidence for the Jury to rightfully conclude that Plaintiff Caperton suffered injuries separate and

distinct from those of the Corporate Plaintiffs;

(d) That the Court took great pains to restrict, by issuing limiting or cautioning jury instructions at trial, or to eliminate the Jury's awareness or consideration of the other matters in litigation in the State of Virginia, in Federal Bankruptcy Court, or in this Court involving the facts and circumstances of other cases, and, therefore, the possibility of duplicate awards is not represented in the Jury's verdict;

(e) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice; and

(f) That the Jury verdict form and the instructions to Jurors on the issue of Plaintiffs' damages allowed the Jury to render a verdict on the issues framed consistent with the law of West Virginia, with the evidence presented to the Jury, and with the Jury's own convictions. *Williams v. Charleston Area Medical Center*, 215 W. Va. 15 (2003).

[13] That in response to the Defendants' argument that the Court's determination of the laws of this State were the proper choice of law, the Defendant's Rule 50(b) argument that Defendants are entitled to judgment as a matter of law because of Defendants' contention that Virginia substantive law applies to the Plaintiffs' tort claims is not

supported by the law or the evidence of record at trial. Under either the principle of *lex loci delicti* (the law of the place where the tort occurred governs) or under the principle of "most significant relationship" test set for the in the *Restatement (Second) of Conflicts of Law*, West Virginia law should govern because: (1) the Defendants are all citizens or residents of, or have substantial contacts, with West Virginia; (2) the Corporate Plaintiffs are either citizens or residents of, or have substantial contacts with West Virginia; (3) the Plaintiff Caperton is a citizen of West Virginia; (4) much of the correspondence and documents submitted as evidence either was sent from, or sent into, West Virginia; (5) the November, 1997, meeting in which many of Defendants' threats and misrepresentations were made occurred in West Virginia. On this issue as well it should be noted that:

(a) That Defendants' misconduct occurred in substantial part in the State of West Virginia, was for the purpose of benefitting Defendants' West Virginia operations, and substantially injured residents of the State of West Virginia;

(b) That, while the Coal Supply Agreement between Plaintiff Sovereign Coal Sales and Wellmore required Sovereign to pursue its breach of contract claims against Wellmore in the State of Virginia, the Defendant in that action (Wellmore) was a *different entity* than the Defendants here, that it was litigated and that jury awarded a verdict based upon breach of contract *only*, and that the Virginia defendant's

appeal was processed in the State of Virginia *only*;

(c) That, as the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the jury's satisfaction that the torts occurred in the State of West Virginia;

(d) That the Defendants argue that their tortious interference with Plaintiffs' business relationships would be lawful in Virginia, where Defendant A.T. Massey Coal Company Inc. is headquartered, is not found by the Court to have substantial merit. Virginia law clearly recognizes a party can be found liable for money damages for the tort of tortious interference with a contract or business relationship. *Tazewell Oil Co. Inc. v. United Virginia Bank/Crestar Bank*, 243 Va. 94, 413 S.E.2d 611 (1992). While Virginia law, like West Virginia law, recognizes economic justification and self-interest as possible defenses for interference, such possible defenses require factual determination as to whether the interference was conducted through improper or wrongful means or methods. Based upon the evidence adduced at trial, the Jury correctly rejected Defendants' contention that their means or methods were proper and not wrongful. To the extent that any of Defendants' tortious conduct may have occurred in Virginia, Defendants

have failed to provide any authority establishing that either Virginia or West Virginia bestows upon a parent corporation an absolute privilege to interfere with the contracts or business relationships of its subsidiaries or third parties, or that a corporation intent upon wrongfully interfering with contractual relations can acquire another corporation for the purpose of carrying out its interference and then enjoy an absolute privilege against such interference. Similarly, the tort of fraudulent conduct committed by Defendants is unlawful under Virginia law. Virginia recognizes a claim for fraud where there has been the knowing or intentional making of a false representation of a material fact, or a knowing and intentional concealment of facts, which has been reasonably relied upon by another party resulting in injury to the misled party. *Bay Point Condo. Ass'n. v. RML and Dryvit* 2001 WL 792690 (Va. Cir. Ct.); *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998); *Ashmore v. Herbie Morewitz, Inc., et al.*, 252 Va. 141, 475 S.E.2d 271 (1996).

(e) That based upon the Court's understanding of the operative elements of those torts, the evidence adduced by the Plaintiffs at trial would clearly have established those elements as well. Nevertheless, while the torts

alleged by the Plaintiffs may be the same or similar as a matter of law in Virginia as in West Virginia, and while Defendants' conduct is unlawful in both Virginia and West Virginia, the Defendants were found in this action to have committed the torts in the State of West Virginia, juxtaposed to the State of Virginia.

(f) That Defendants previously raised these choice-of-law/venue arguments before the United States Bankruptcy Court for the Western District of Virginia by way of adversary proceedings filed there, and before the United States District Court for the Southern District of West Virginia, by way of removal proceedings commenced there, and that both of those courts determined that the Circuit Court of *Boone County, West Virginia was an appropriate forum* for the trial of these matters, that the Circuit Court was qualified to determine the appropriate substantive law, and that a Boone County jury was competent to determine the facts of this case.

(g) That in light of the standard for the granting of a new trial, then, the Court further finds and concludes that the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice. Moreover, upon review of the entirety of the record or of

specific references, it is not reasonably clear to this Court that prejudicial error has crept into the record or that substantial justice has not been done, as required in our Court's recent decision in *Morrison v. Sharman*, 200 W. Va. 192 (1997).

[14] In respect to the Defendants' arguments regarding the punitive damages grounds, the Defendant's Rule 50(b) argument that Defendants are entitled to judgment as a matter of law because of Defendants' contention that the Jury's punitive damages award was either duplicative or unconstitutional is not supported by the law or the evidence of record at trial. On June 30, 2004, the Court, having heard from the parties regarding the Jury's award of punitive damages and Defendants' challenges to the same, entered its *Order on Jury Award of Punitive Damages*, including the "Findings and Conclusions" section stated therein. On August 27, 2004, the Court entered its *Amended Order on Jury Award of Punitive Damages*, including the "Findings and Conclusions" section stated therein;

(a) That, from the evidence set forth in those Orders, the Jury, being a rational trier of fact, had sufficient evidence before it to conclude that Defendants' conduct was reprehensible, as our law defines such, and warranted the imposition of punitive damages in the amounts that such were assessed by the Jury for the conduct of the Defendants that had continued even after the initiation of this litigation;

(b) That even beyond the above referenced evidence, the Jury in this case also had before it evidence that Defendants stood to profit substantially from their wrongful conduct. The Defendants' own internal projections projected that they stood to make as much as $104 million in profit by mining Harman and certain adjoining reserves. Plaintiffs also introduced evidence that the Defendants' sales to USX, LTV's alternate coke supplier, increased in 1998 after the closure of the Pittsburgh Works. Defendants' revenues were millions higher after Harman was put out of business. Our Supreme Court in the landmark case of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656(1991), held:

> If the defendant profited from his wrongful conduct, the punitive damages award should be in excess of the profit, so that the award discourages future bad acts by the defendant.

Given this guideline, through the destruction of the Plaintiffs' businesses, the Defendants stood to gain additional, though not readily quantifiable, benefits by the elimination of a competitor and an increase in its market share;

(c) That in regard to the *Garnes* factor of the Defendants' financial position or status, the evidence adduced at trial before the Jury demonstrated that

Defendants were and are a large corporation, with annual revenues between approximately $1 billion and $1.2 billion from 1997 through the time of trial;

(d) That while the Court in *Garnes*, as well as its progeny, has consistently held that the ratio of punitive damages to non-punitive damages may be supportive of a factor of 1, 3, 5 or possibly more, given the nature and extent of the evidence in a case, in the present case, the *ratio of punitive damages to non-punitive damages being less than 1/7th* is well within the ratios considered reasonable by our Supreme Court of Appeals;

(e) That in regard to the other arguments regarding this Jury's award of punitive damages, particularly those of a constitutional dimension (*See State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)), that have been strenuously argued in the *Garnes* review proceeding (*see* August 27, 2004 Order), together with the Defendants' arguments at this time within the Rules 50 and 59 context, the Court has become aware of the standards for analyzing such outlined by our United States Supreme Court. In this case, however, as noted hereinabove there was very significant evidence from which a jury could

properly find that Defendants' conduct was reprehensible and, specifically, that the targets of Defendants' conduct were financially vulnerable, as Defendants completely understood and knew; that the destruction of Plaintiffs' businesses was the known and intended result of Defendants' tortious interference and fraud; that Defendants' misconduct involved a series of bad acts taking place over many months; and that Defendants repeatedly disregarded and interfered with Plaintiffs' rights and otherwise deceived Plaintiffs because of Defendants' strict adherence to cost-benefit analyses that concluded Defendants would profit as a result of such misconduct;

(f) That in the present case, as well, there are no *State Farm/Gore*-type "due process" concerns because the award of punitive damages (*e.g.* ratio of 1 to 7) was, by no stretch of the imagination, either "grossly excessive" or "arbitrary", *State Farm*, *op cit*, at 1519-1520, for operative application of these elements;

(g) That from the evidentiary record and from the Court's rulings on the legal issues presented, there is no rational support for the argument that this case was used as a platform to expose or punish perceived deficiencies in Defendants' multi-state operations, nor did the Plaintiffs seek to submit substantial evidence regarding other

incidents, bad acts or bad policy on the part of Defendants. Any evidence that could have been adduced regarding other bad acts of Defendants was at most limited in nature; with admonishments, cautionary or curative instructions regularly given by the Court; with the Court taking every reasonable precaution to maintain a fair and impartial jury; and, with any such evidence or inferences that could be drawn therefrom largely in response to statements volunteered by Donald Blankenship during his trial testimony;

(h) That while the Court is aware of the United States Supreme Court's determination that it is improper for a jury in one state "to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state where the jury is sitting] or its residents," *State Farm*, *op cit*, 1523-1524, citing *Gore*, 517 U.S. 559, 572-573 (1996), in the present case, however, the Defendants' conduct, and misconduct as the Jury determined: [1]occurred in substantial part in the State of West Virginia: [2] was for the purpose of benefiting the Defendants' West Virginia operations; and [3] substantially injured residents of the State of West Virginia. As the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the Jury's satisfaction that the torts occurred in the State of West Virginia.

Therefore, it was the State of West Virginia's court system that had a legitimate interest in the just and proper determinations of the issues joined between the parties hereto, if such torts were properly established before the Jury and appropriate damages awarded thereon;

(i) That this Court has determined as a matter of law that the Court properly charged the trial Jury on the issue of punitive damages by giving an instruction of law based on the enumerated factors set out in the *Garnes* case. Moreover, the Court reiterates from its prior determinations (*see* August 27, 2004 Order) that: {1} given the evidence adduced at trial; {2} given the *Court's Charge and Instructions of Law*, which incorporated the Defendants as well as the Plaintiffs proposed instructions; {3} given the closing arguments by counsel before the Jury; {4} given the Jury's deliberations' process itself; and {5} given the Jury's Verdict that it returned awarding less that 1/7th of the total award of damages in punitive money damages, that the Jury properly applied the Court's *Garnes* instructions to the relevant and controlling facts of the case.

(j) That the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not

result in a miscarriage of justice, all as outlined above; and

(k) That as a result of all the findings and conclusions set forth above, as well as all of the conclusions and findings previously set forth in the Court's June 30, 2004, *Order on Jury Award of Punitive Damages*, including the "Findings and Conclusions" section stated therein, and in the Court's August 27, 2004, *Amended Order on Jury Award of Punitive Damages*, including the "Findings and Conclusions" section stated therein, that the August 27, 2004, *Amended Order on Jury Award of Punitive Damages*, including the "Findings and Conclusions" section stated therein, that the Jury's punitive damages award in the amount of $6 million was factually supported by the record evidence adduced; properly instructed upon by the Court; thoughtfully argued by the respective counsel; and legally determined and awarded by the Jury. For the Defendants now to argue otherwise, is for the Defendants to argue against their own *.Garnes*-based proposed *Instructions of Law* offered at trial and incorporated by the Court.

[15] That in regard to the Defendants' respective arguments on alleged trial errors, the Court further notes that in accordance with the applicable provisions of Rule 59(a) of the *West Virginia Rules of Civil Procedure*, the Defendants' assert that they are

entitled to a new trial based upon various errors this Court committed during the course of trial. Within the context of considering such a Rule 59(a) *Motion*, our Supreme Court has held that the trial court

> ". . . has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syllabus Point 2, *Ayre v. Roop*, 205 W.Va. 193 (1999)

In considering a Rule 59(a) *Motion for a New Trial*, the trial court's conclusions as to existence of reversible error are reviewed under an abuse of discretion standard, and the underlying factual findings are reviewed under a clearly [illegible]oneous standard (*see* our Court's recent analysis [illegible] such in *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W.Va. 145 at 148 (2001).

[16] That within this Rule 59 *Motion*'s context, the Court has determined that it is proper to reiterate certain previous determinations, in that the Court has addressed above the Defendants' arguments regarding its alleged basis for judgment as a matter of law pursuant to Rule 50(b). In making its findings and reaching its conclusions regarding Defendants' Rule 50(b) motion grounds, the Court has considered the evidence in the light most favorable to Plaintiffs, in accordance with the legal principles articulated by the referenced points and

authorities from our Supreme Court. In considering those same arguments in the context of Rule 59(a), the Court, in independently weighing the evidence and considering the credibility of the witnesses, hereby finds and concludes that, not only is the verdict not against the clear weight of the evidence, but rather the clear weight of the evidence firmly supports the Jury's verdict in its entirety, that the Jury's verdict is not based on false evidence, and that the Jury's verdict will not result in a miscarriage of justice.

[17] That in regard to the Defendants' arguments regarding alleged errors committed by this Court during the course of trial, the Court *in seriatim* finds and concludes as follows:

(a) The Defendants assert more than twenty errors concerning the Court's *Jury Charge and Instructions of Law* and the *Jury Verdict Form* submitted to the Jury. The Court's Charge to the Jury was based largely upon the West Virginia Model Jury Instructions suggested by our Supreme Court of Appeals, including language from the section on Business and Commercial Law regarding tortious interference and fraud; the proposed Instructions of Law proposed by the Plaintiffs and the Instructions of Law proposed by the Defendants; the Court's own research, and the facts adduced during the trial of this matter. In that respect, please see the Explanatory Notes on the Court's Charge and Instructions of Law, as well as the Court's Verdict Form, which

expressly set forth the legal authorities relied upon by the Court for the generation and utilization of both. These explanations are hereby incorporated as if specifically set forth herein;

(b) Following its further review and consideration of the *Court's Jury Charge and the Instructions of Law*, as well as the authorities governing such (*see Adkins v. Foster*, 195 W. Va. 566 (1995), the Court acknowledges that a trial judge has considerable discretion in submitting instructions and verdict forms to the jury. As our Supreme Court stated in the *Adkins* case:

> The criterion for determining whether the discretion is abused is whether the verdict form together with any instructions relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions.

Thus, the controlling provisions of Rules 49 and 51 of the *West Virginia Rules of Civil Procedure* should be read *in para materia* with the provisions of Rule 23.02 of the *West Virginia Trial Court Rules*, all of which so govern jury instructions and jury verdicts. As they should be read *in para materia*, so should *Adkins* principles be considered

and applied together with *State v. Belcher*, 161 W. Va. 660 (1978) and *State v. Kopa*, 173 W. Va. 43 (1983), governing the requirements that instructions of law must correctly state the law and that instructions of law must be supported by the evidence. (*see also Radec, Inc. v. Mountaineer Coal Dev. Co.*, 210 W. Va. 1 (2000) for a recent review by our Court of the appropriate standard) As a result therefore, the Court hereby concludes that it sufficiently instructed the Jury so that they understood the issues involved by proper statement of the law, which were properly supported by the evidence. Correspondingly, it concludes that in conformity with the procedural Rules and the legal principles governing such, the Jury's Verdict Form was one which properly framed the issues consistent with the law, with the evidence adduced and with the Jury's own convictions.

* * *

testimony of Defendants' witness Mr. James Gardner, a lawyer who sat at counsel table for much of the trial, the Court limited his testimony only to the extent that the witness, who acted as both a legal and business advisor to Defendants, told the Court outside the hearing of the Jury that he could not distinguish between advice given in a business capacity and advice given in a

legal capacity. Defendants asserted the attorney client privilege to prevent the discovery of memoranda prepared by Mr. Gardner for Defendants. The Court deferred to Mr. Gardner's statement that he could not differentiate between his roles as business advisor and legal advisor before limiting his testimony to only those issues he could testify to in his business capacity. In doing so, the Court ruled partially in favor of both parties by allowing the witness's testimony, but limiting it by the witness's own admission (*see CMAC, op cit*).

(d) As for the Defendants' contention that the Court erred by questioning certain witnesses at trial, including certain of Defendants' expert witnesses, the Court limited its intervention only for the purpose of discerning information underlying the respective opinions and conclusions reached by each side's expert witnesses. As the Defendants arguments acknowledge, Rule 614 of the *West Virginia Rules of Evidence* empowers the Court to pose questions to any witness, in its discretion, so long as it conduct of such questioning is fair and impartial (*see State v. Farmer*, 200 W. Va. 507 (1997). As the record will reflect the Court routinely inquired of each party at the conclusion of its questions, whether that party wished to inquire further, all for the express purpose of conducting the questioning

". . . so as not to prejudice the parties." The Court finds and concludes that its questioning was not improper, but routine and conducted in the regular manner of questioning. As such, it did not prejudice the parties, and it did not invade the jury's province.

(e) As for the Defendant's contention that the Court erred with regard to any references made to the Virginia breach of contract litigation made by all parties, *including the Defendants*, any references that could have been made inadvertently regarding that litigation was limited in nature and was followed reasonably thereafter with cautionary, or curative, instructions following the Court's consultation with counsel for both the Plaintiffs and the Defendants.

(f) As for the Defendants' contentions that the Court erred by not declaring a mistrial as a result of trial publicity, the Court regularly and repeatedly cautioned the Jury to avoid exposure to any media source which might discuss the trial, including newspaper, television and radio accounts regarding the trial or other activities of any of the parties. This determination is reinforced by the fact that there has been no *Sutphin*-type or *Miller*-type challenges to the fairness and impartiality of the Jury before, during or after the Jury's return of the verdict.

(g) As for the, Defendants' contention that the Court erred by allowing "opinion evidence" from Plaintiffs' witnesses Henry Cook and Hugh Caperton, the Court, in light of Defendants' assertions, has reviewed the *West Virginia Rules of Evidence* regarding opinion evidence, particularly Rule 701, as it did at trial, and finds and concludes that the type of "opinion evidence" offered is the same or similar to that allowed within the parameters of *Evans v. Mutual Mining*, 199 W. Va. 526 (1997), wherein the owner of property is competent and qualified to offer such; based upon his personal knowledge, with the ultimate decision to be made by the trier of fact.

(h) As for the Defendants' contention that the Court erred by limiting Defendants from arguing that Corporate Plaintiffs were "inevitably" doomed to financial failure, the Court finds and concludes that Defendants' contention is mistaken as a matter of fact, as well as a matter of law, in that contrary to Defendants' assertion, the Court allowed the Defendants to introduce both testimony and documentary evidence regarding the Corporate Plaintiffs' financial condition throughout the course of the trial. The Court did limit its proximate cause instruction to one generally accepted in West Virginia in order to avoid juror confusion and in order to avoid a possible misstatement of the

law, expressly by implicating legal concepts such as "last clear chance", "sudden emergency" or "thin skull". Even a business enterprise which is losing money can nevertheless suffer injury. In that respect, our Supreme Court in *Lively v. Rufus*, n. 15, 207 W. Va. 436 (2000) held that ". . . A business with a value of zero or less could, nevertheless, be injured by wrongdoing that created additional debt or further impeded its ability to pay existing debt." Within this context, the Court finds that the evidence of record clearly supports the conclusion that that the Court's instruction of law was proper, and that the Jury's determinations that the Defendants' conduct proximately caused injury, both corporately and personally, to the Plaintiffs was reasonable, given the evidence adduced at trial and the legal principles applicable thereto.

(i) As for the Defendants' contention that the Court erred by allowing irrelevant evidence to be presented to the Jury, the Court has reviewed the *West Virginia Rules of Evidence*, particularly Rules 402 and 403; regarding relevancy in light of Defendants' assertions, and finds and concludes that it acted properly and reasonably in excluding evidence more prejudicial than probative, and admitting evidence that the Court determined was more probative than prejudicial. In this

respect, the record is replete with the Court's consonant rulings of what is fair for one side, is fair for the other. Moreover, our Supreme Court has consistently held that the Circuit Court has considerable latitude in determining whether to admit evidence as relevant, and decisions concerning relevancy are reviewed by the Supreme Court under an abuse of discretion standard [*see Craddock v. Watson*, 197 W. Va. 62 (1996); and *Gonzalez v. Conley*, 199 W. Va. 288 (1997)].

(j) As for the Defendants' contention that the Court erred by refusing to give various instructions as a part of the Court's charge to the Jury, the Court's charge to the Jury was based largely upon the West Virginia Model Jury Instructions suggested by our Supreme Court of Appeals, including language from the section on Business and Commercial Law regarding tortious interference and fraud, and the Court, in reviewing its charge to the Jury as a whole, finds and concludes that it sufficiently instructed the Jury so that they understood the issues involved and were not misled regarding the applicable law. The Court further approves and adopts those findings and conclusions set out above in subsections (a) and (b).

(k) As for the Defendants' contention that the Court erred regarding the impact or

effect of testimony about the availability of the "Pittston Reserves", the Court finds and concludes that resolving any conflicts in such testimony among the various witnesses was clearly within the province of the Jury, and that the evidence on the issue of the "Pittston Reserves" was clearly sufficient for the Jury to reach the verdict it delivered, when considered after as the legal principles analyzing such verdicts are applied as noted hereinabove from *Brannon v. Riffle, op cit*, or *State Guthrie, op cit*.

(l) As for the Defendants' contention that, pursuant to the "cumulative error doctrine," the Jury's verdict is inherently unreliable, the Court finds and concludes that any errors at the trial of this matter were insignificant or inconsequential (*see* WVRCP Rule 61), that all material evidence was properly received by the Jury, and that the evidence was clearly sufficient for a jury to properly conclude what represented substantial justice, and render a verdict that reflected such (*see also Roberts v. Consolidated Coal Co.*, 208 W. Va. 218 (2000).

[18] That when viewed summarily, the evidence at trial was clearly sufficient for a jury to conclude that Defendants' wrongful conduct extended over an extensive period of time and caused substantial injury and damages to all Plaintiffs, and that the evidence was clearly sufficient to support the

damages awarded by the jury in its verdict as reflected on the Jury Verdict Form. Moreover, all of the evidence adduced at trial was properly adduced and that the Court has identified no reversible error supporting the relief requested in Defendants' *Motion for Judgment as a Matter of Law, Motion for New Trial* or, in the Alternative, *Motion for Remittitur*, and that the evidence at trial was sufficient for a jury to conclude that the Plaintiffs were severely harmed by the conduct of the Defendants and suffered legally-cognizable damages in the amounts determined by the Jury. Finally, the Court concludes that the Jury's verdict is supported by the clear weight of the evidence, is not based on false evidence, and will not result in a miscarriage of justice, all as more particularly set out hereinabove; and,

[19] That as a result of the findings and conclusions set forth above as well as the findings and conclusions set forth in prior Orders of this Court and of all the evidence of record, the Court has expressly determined that it is proper, just and reasonable, as well as equitable and necessary, to DENY the Defendants' *Motion for Judgment as a Matter of Law, Motion for New Trial or in the Alternative, Motion for Remittitur*, and to CONFIRM AND AFFIRM the Jury's verdict award to the Plaintiffs in its entirety;

[20] That in accordance with the applicable provisions of *West Virginia Code* s56-6-31, the Plaintiffs are entitled to post-judgment interest at the rate of ten (10) percent per annum on the full amount of the Jury's verdict award of damages, said interest accruing from the date the judgment was entered by this Court, or August 15, 2002; and

[21] That as a result of the Court's respective findings of fact and conclusions of law, the Court notes the objections and exceptions of both the Plaintiffs and the Defendants for the record in this matter.

All of which is hereby ORDERED, ADJUDGED and DECREED:

It is further hereby ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall provide notice of the entry of this Order by forwarding a certified copy of the same upon all of the parties of record herein, through counsel as appropriate, in accordance with Rules 10.01-12.06, as well as 24.01 of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested, or by hand delivery, or by facsimile transmission/communication at the numbers for such set out in the Court's file.

ENTERED on this 15th day of March, 2005, A.D.

/s/
CHIEF JUDGE

A COPY ATTEST
/s/
Sue Ann Zickafoose
CIRCUIT CLERK

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,	)	
Plaintiffs below/Respondents,	)	Pre-Petition Matter No. ____ (Circuit Court of Boone County Civil Action No. 98-C-192 Honorable Jay M. Hoke, Judge)
v.	)	
A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC.,	)	
Defendants below/Petitioners.	)	

To: The Honorable Brent Benjamin
Justice of the Supreme Court of Appeals of
West Virginia
Capitol Complex, Building 1, Room E-302
Charleston, WV 25305

MOTION OF RESPONDENT CORPORATIONS FOR DISQUALIFICATION OF JUSTICE BENJAMIN

Pursuant to Rule 29 of the West Virginia Rules of Appellate Procedure, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (collectively "Harman") respectfully move to disqualify Justice Brent Benjamin from participating in any decision related to the above-captioned litigation.[1] The confluence of facts surrounding the involvement of Massey's CEO in the recent Supreme Court election, in light of a 2002 jury verdict against Petitioners (hereinafter "Massey") and Massey's public avowal to appeal this case, give an appearance that could cause a loss of faith in the judicial system if Justice Benjamin were not to recuse himself in this matter.

A reasonable person, considering the aggregate facts in this situation, would likely believe that *any* judge who received the kind of unprecedented support that was provided by petitioner Massey and its CEO would be tainted. The principle of Due Process requires that where such a shadow is cast over the objectivity of a member of the judiciary, so much so that the public would lose confidence in the fairness of the government, a justice should disqualify himself from participating in decisions related to parties for which he or she appears to hold a bias or on issues for which he or she retains interest. Keeping in mind that Due Process obliges the "appearance of justice to be satisfied," *State ex. rel. Brown v. Dietrick*, 191 W.Va. 169, 173; 444 S.E.2d 47, 51 (1994), we entreat Justice Benjamin to

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[1] Hereinafter the lawsuit filed in the Circuit Court of Boone County, West Virginia at No. 09-C-192 shall be referred to as the "Harman Action"; and the seven week trial of the Harman Action shall be referred to as the "**Harman Trial**."

carefully consider the facts at hand and the merits of this argument, and disqualify himself from participation in decisions concerning Massey which relate to Harman and Mr. Caperton.

I. LEGAL PRINCIPLES

The concept that there are certain situations in which a judge or justice should be disqualified from ruling on certain matters before the court is rooted in one of the most essential American legal principles, that of Due Process under the law. Due Process, in its simplest form, requires that a person be confident of receiving a "fair trial in a fair tribunal." *Louk v. Haynes*, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976), quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927).

Due Process is the foundation of our legal system and the basis upon which our citizenry's confidence in the courts rests. Recognizing that justices are human and that extrajudicial circumstances may unfairly impinge upon their ability to be neutral in deciding a particular case, our courts have long acknowledged the notion of judicial disqualification or recusal. Under West Virginia law, disqualification is codified in Rule 29 of the West Virginia Rules of Appellate Procedure, which reads in part: "A justice shall disqualify himself or herself, upon proper motion or *sua sponte*, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct. . ." As Justice Maynard stated in *State ex. rel. Mantz v. Zakaib*, ___ W. Va. ___, 609 S.E.2d 870 (2004):

> The United States Supreme Court has described the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts

> concerning the judge's impartiality. The Supreme Court has stated that the goal is to avoid even the appearance of partiality. To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

Justice Maynard also stated in *Mantz* that the Code of Judicial Conduct specifically applies to justices of the West Virginia Supreme Court of Appeals. *Id.*,___ W.Va. at ___, 609 S.E.2d at 874.

The West Virginia Code of Judicial Conduct Canon 3(E)(1) adopts its form and language almost verbatim from its federal counterpart, setting forth that a judge or justice should disqualify himself or herself in any proceeding where "the judge's impartiality might reasonably be questioned." Both the Canon language itself and the Commentary make it abundantly clear that the examples enumerated are by no means the only situations when impartiality may be questioned, and a judge may be disqualified "regardless of whether any of the specific rules in Section 3(E)(1) apply." *Commentary to Canon 3(E)(1), W.Va. Code Jud. Conduct.*

Both the West Virginia Courts and the United States Supreme Court have held that an objective standard should be used to determine whether or not impartiality of a member of the judiciary may be reasonably questioned. This standard for disqualification is not whether the judge will actually be fair and unbiased, but "whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality." *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 108, 459 S.E.2d 374, 385 (1995); *Liljeberg v.*

Health Services Acquisition Corp., 486 U.S. 847, 860 (1988). *See also State ex rel. Mantz v. Zakaib*,___ W.Va. at ___, 609 S.E.2d at 875 (2004).

Similarly, Canon 2 of the West Virginia Code of Judicial Conduct declares that "a judge shall avoid... the appearance of impropriety in all of the judge's activities," and specifies in Part A of that Canon, that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Thus, judges must recuse themselves not only when the judge "has a personal bias or prejudice concerning a party," but also when a judge's "impartiality might reasonably be questioned." The rules seek to preclude the *appearance* of unfairness which undermines confidence in the courts and the concept of Due Process itself.

The overwhelming facts and circumstances, outlined below, which connect the 2002 jury verdict in the above litigation with petitioner Massey's involvement in the 2004 judiciary election in which Justice Benjamin won his seat on the West Virginia Supreme Court of Appeals create reasonable and substantial, if not overwhelming, doubts whether Justice Benjamin – or any judge in his shoes – could be impartial and unbiased in adjudicating Massey's appeal in this matter. Harman does not at all question Justice Benjamin's integrity; we only argue that the facts, viewed objectively, reveal an *appearance* of unfairness. Due Process requires no more than the appearance of unfairness, under the circumstances, to necessitate disqualification.

* * *

III. LEGAL ARGUMENT

IN THE EYES OF THE PUBLIC, JUSTICE BENJAMIN'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IN THIS CASE; THEREFORE, RECUSAL IS NECESSARY

Canon 3(E)(1) specifically provides that "[a] judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ." (Emphasis added). The drafters of Canon 3(E)(1) recognized that not all reasons for disqualification of judges or justices can fit into the examples enumerated in Canon 3(E)(1), since it would be impossible to anticipate all of the different circumstances in which a judge or justice would become disqualified. The Commentary to the Canon reads in part: "under this rule a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any specific rules in Section 3(E)(1) apply." This Court has acknowledged the importance of the "catch all" provision of Canon 3(E)(1), in particular, in bolstering public confidence in the courts. *See State ex. rel. Brown v. Dietrick*, 191 W.Va. at 174, 444 S.E.2d at 52, quoting Professor Leslie Abramson's statement "that avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself." Thus, any set of facts or circumstances that lends an appearance of impropriety is reason enough for disqualification.

The United States Supreme Court has described the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. *Liljeberg*

v. Health Services Acquisition Corp., 486 U.S. 847 (1988). The Supreme Court stated that "the goal is to avoid even the appearance of partiality." *Liljeberg*, 486 U.S. at 860. To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself. *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. at 108, 459 S.E.2d at 385. Accordingly, the inquiry under Canon 3(E)(1) of the Code of Judicial Conduct turns on how the facts appear to an objective observer, which has been described by this Court as "the well-informed, thoughtful and objective observer." *Id.*

Moreover, the Fourth Circuit has held that the hypothetical reasonable observer in a judicial recusal matter is not the judge himself, or even a judicial colleague, but a person outside of the judicial system. *U.S. v. DeTemple*,162 F.3d 279 (4th Cir. 1998), *cert. denied*, 526 U.S. 1137(1999).[60] The court in *DeTemple* explained that since "judges are accustomed to the process of dispassionate decision making and keenly aware of their constitutional and ethical obligations to decide matters solely on the merits, they may regard asserted conflicts to be more

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60 *DeTemple* is a case involving a motion for the recusal of a Federal District Judge pursuant to 28 U.S.C.A. 455(a), which reads in pertinent part as follows: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The language of 28 U.S.C.A. 455(a) is identical in pertinent part to Canon 3(E)(1). Section 455(a) has been interpreted as requiring recusal in questionable cases. *See Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (holding "if the question of whether §455(a) requires disqualification is a close one, the balance tips in favor of recusal.").

innocuous than an outsider would." *Id.*, at 287. The question thus becomes whether an objective and well-informed observer, meaning the average well-informed West Virginian, would reasonably question Justice Benjamin's impartiality in a case involving Massey given that Massey's CEO has, in effect, invested over $3 million of his own money to influence the outcome of one judicial race.[61] The inescapable answer is undeniably yes. The affirmative answer to the query is further confirmed by the enormous amount of press this issue has garnered as indicated earlier in this brief. Consequently, the public's confidence in the state's highest court is at stake.

The importance of public confidence in the judicial system, and the negative effect of judges hearing cases involving persons who have made large contributions[62] to judicial elections, let alone the effect of contributors on the scale of Mr. Blankenship, is explained at great length in the Report of the American Bar Association Commission on the 21st Century Judiciary, entitled "Justice in Jeopardy":

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[61] As set forth previously in detail, Mr. Blankenship spent $2.5 million to defeat one candidate, while at the same time spending an additional half million dollars to support the other.

[62] The Report of the American Bar Association Commission on the 21st Century Judiciary entitled "Justice in Jeopardy" discussed *large* contributors. However, Mr. Blankenship's contributions both in favor of Justice Benjamin's campaign and against Justice McGraw's campaign were nothing short of *enormous*. In fact, the amount of money personally contributed by Mr. Blankenship toward the election of Justice Benjamin is absolutely stunning in the eyes of any reasonably objective observer.

> The importance of public confidence in the court is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public's acceptance and support. Without it, an otherwise sound judiciary cannot long endure.
>
> * * *
>
> Such developments threaten to poison public trust and confidence in the courts, by fostering a series of perceived improprieties: that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy, the powerful, or political and racial majorities.

Along those same lines, the West Virginia Legislature has declared that a contribution of One Thousand Dollars ($1,000.00) per judicial candidate is the permissible limit for contributions which, presumably, do not create the possibility of undue influence. That notwithstanding, the amount and timing of the contributions in this case by one man certainly suggests grounds for disqualification. Respondents believe that confidence in our Supreme Court could be affected should Justice Benjamin remain on this case.

The United States Supreme Court has strongly emphasized the importance of maintaining public confidence in our governmental system. In cases involving the restriction of campaign financing and contributions, the Court called the prevention of the erosion of public confidence in the electoral process an important governmental interest. *E.g.*, *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 95 (2003).

Succinctly, as Judge Maynard stated in *Mantz*, "To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself."

IV. CONCLUSION

In no way do corporate respondents question Justice Benjamin's integrity, or his desire to do what is right and fair. Respondents merely put forth the proposition that a reasonable person, in possession of the facts set forth in this brief, would believe that *any* judge would be unable to be fair and impartial in this appeal. We know that Justice Benjamin is keenly aware of his constitutional and ethical obligations to decide matters solely on the merits as stated in *DeTemple*, *supra*, and do not doubt that he would strive to uphold those obligations in this case; but again, we must look at the facts through the eyes of the "well-informed, thoughtful and objective observer," not Justice Benjamin's or even one of his colleagues on this Court. That is precisely why this Court has held that Canon 3(E)(1) may, at times, bar judges and justices from participating in proceedings where they have no actual bias and would do their very best to be fair, but for the court "to perform its high function in the best way, justice must satisfy the appearance of justice." *Louk v. Haynes*, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976). Thus, disqualification is called for where there exists an appearance of bias, whether or not the judge or justice would actually be biased, prejudiced or unfair. Accordingly, Respondents respectfully submit that Canon 3(E)(1) should disqualify Justice Benjamin from hearing the case *sub judice*, and Justice Benjamin should recuse himself from the case in

order to promote confidence in the judiciary and to avoid even the appearance of partiality.

Respectfully submitted,

Dated:
October 19, 2005 /s/

Robert V. Berthold, Jr., Esquire
(W.Va. I.D. #326)
BERTHOLD, TIANO & O'DELL
P.O. Box 3508
Charleston, WV 25335
(304) 345-5700

Of Counsel:

David B. Fawcett, Esquire
BUCHANAN INGERSOLL
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-3931

Attorneys for Corporate Plaintiffs

Massey Energy

MEMORANDUM

TO: Massey Members

FROM: Don Blankenship

DATE: August 5, 2002

SUBJECT: JURY VERDICT

It is difficult to know what to say about last week's jury verdict. I, of course, can't be as clear as I'd like to be.

The simple truth is that the jury awarded $50,000,000 for something that didn't happen. We never set out to put Harman out of business. Harman was broke before we ever did any business with it.

The verdict is a frightening result. It is worse than the infamous McDonald's coffee spill verdict. It will damage Massey but it will also damage all of West Virginia and play a role in further impoverishing the children of our state.

The winners were rude to Massey witnesses throughout the trial. They called Ben Hartfield an "SOB", made ultimate obscene gestures at our relay runners, and addressed Stan Suboleski with the "F" word.

We will continue to do the right thing, even though it seems to go unrewarded. In 1985, I watched our members get beaten, shot, and belittled

in every manner. In 1989, I watched it again. Every day, we watch the news media mislead the public about our company, but this verdict has kept me awake and concerned me more than all these other issues. Six jurors heard both sides and unanimously agreed to punish Massey for something that clearly didn't happen.

It is difficult to accept that our society in West Virginia could produce such a verdict. We intend to appeal the verdict. More fundamentally, we intend to keep working for the success of our company and our members. You can do your part if you're in production by getting 30 more feet, or 10% more yardage, or 2 more longwall cuts, and if you're in accounting, by watching every bill. But regardless of your job description, we all need to work together, not only as a team, but as the family that we've formed, to do a little better and to overcome our adversaries.

"Massey Energy – Doing the Right Thing with Energy."

Form 8872
(November 2002)
Department of the Treasury
Internal Revenue Service

Political Organization Report of Contributions and Expenditures

OMB No. 1545-1696

▶ See Separate Instructions

A. For the period beginning 08/20/2004 **and ending** 09/30/2004

B. Check applicable box:

- √ Initial report
- ___ Change of address
- ___ Amended report
- ___ Final report

1. Name of organization — **Employer identification number**

And For The Sake Of The Kids — 20 - 1515424

2. Mailing address (P.O. Box or number, street, and room or suite number)

PO Box 1716

City or town, state, and ZIP code

Williamson, WV 25661

3. E-mail address or organization:

andforthesakeofthekids@yahoo.com

4. Date organization was formed:

08/20/2004

5a Name of custodian of records

Carl Hubbard

5b Custodian's address

322 Dry Hill Road
Beckley, WV 25801

6a Name of contact person

Carl Hubbard

6b Contact person's address

PO Box 1716
Williamson, WV 25661

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number

322 Dry Hill Road

City or town, state, and ZIP code

Beckley, WV 25801

8 Type of report (check only one box

- ___ First quarterly report (due by April 15)
- ___ Second quarterly report (due by July 15)

√	Third quarterly report (due by October 15)
____	Year-end report (due by January 31)
____	Mid-year report (Non-election year only-due by July 31)
____	Monthly report for the month of: (due by he 20th day following the month shown above, except the December report, which is due by January 31)
____	Pre-election report (due by the 12th or 15th day before the election) (1) Type of election: (2) Date of election: (3) For the state of:
____	Post-general election report (due by the 30th day after general election) (1) Date of election (2) For the state of:

9	**Total amount of reported contributions (total from all attached Schedules A)**	9.	$ 2506500
10	**Total amount of reported expenditures (total from all attached Schedules B)**	10.	$ 2475375

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete

Sign Here ▶ /s/ Carl Hubbard ▶ 10/15/2004

Signature of authorized official — Date

Form 8872 (11-2002)

[redacted] Itemized Contributions Schedule A

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$500

Amount of contribution
$500

Date of contribution
08/20/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$100500

Amount of contribution
$100000

Date of contribution
08/20/2004

Contributor's name, mailing address and ZIP code
James A. & Frances A. Ceresa
310 Blue Run Road
Cheswick, PA 15024 - 4004

Name of contributor's employer
Jenmar Corporation

Contributor's occupation
CFO

Aggregate contributions year-to-date
$1250

Amount of contribution
$1250

Date of contribution
08/20/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$300500

Amount of contribution
$200000

Date of contribution
08/23/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1200500

Amount of contribution
$900000

Date of contribution
08/30/2004

Contributor's name, mailing address and ZIP code
Eugene H. Stewart
180 Forsythe Road
Valencia, PA 16059

Name of contributor's employer
Jenmar Corporation

Contributor's occupation
Vice President - Operations

Aggregate contributions year-to-date
$1250

Amount of contribution
$1250

Date of contribution
08/27/2004

Contributor's name, mailing address and ZIP code
John C. Stankus
425 Ironwood Fr.
Canonsburg, PA 15317

Name of contributor's employer
Jenmar Corporation

Contributor's occupation
Vice President - Engineering

Aggregate contributions year-to-date
$1250

Amount of contribution
$1250

Date of contribution
08/27/2004

Contributor's name, mailing address and ZIP code
William H. Nelson III
820 Shades Creek PKY STE 2000
Birmingham, AL 35209

Name of contributor's employer
Nelson Brothers

Contributor's occupation
President

Aggregate contributions year-to-date
$25000

Amount of contribution
$25000

Date of contribution
08/30/2004

Contributor's name, mailing address and ZIP code
Charles A. Nelson
2816 Pumphouse Road
Birmingham, AL 35243

Name of contributor's employer
Nelson Brothers

Contributor's occupation
CEO

Aggregate contributions year-to-date
$25000

Amount of contribution
$25000

Date of contribution
08/30/2004

Contributor's name, mailing address and ZIP code
Frank Calandra
P.O. Box 111253
Pittsburgh, PA 15238 - 0653

Name of contributor's employer
Jenmar Corporation

Contributor's occupation
President

Aggregate contributions year-to-date
$10000

Amount of contribution
$10000

Date of contribution
08/30/2004

Contributor's name, mailing address and ZIP code
Jack R. Eaton, Jr.
656 Hutton Road
Oakmont, PA 15139

Name of contributor's employer
Jenmar Corporation

Contributor's occupation
Vice President - Sales

Aggregate contributions year-to-date
$1250

Amount of contribution
$1250

Date of contribution
08/21/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1355500

Amount of contribution
$155000

Date of contribution
09/10/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1555500

Amount of contribution
$200000

Date of contribution
09/16/2004

Contributor's name, mailing address and ZIP code
Tracy W. Hylton
P.O. Box 1109
Beckley, WV 25802

Name of contributor's employer
Perry & Hylton, Inc.

Contributor's occupation
President

Aggregate contributions year-to-date
$1000

Amount of contribution
$1000

Date of contribution
09/16/2004

Contributor's name, mailing address and ZIP code
Stephanie Hannah Wollum
Rt. 2 Box 178
Delbarton, WV 25670

Name of contributor's employer
Steakside at Southside Mall

Contributor's occupation
Co-Owner

Aggregate contributions year-to-date
$5000

Amount of contribution
$5000

Date of contribution
09/21/2004

Contributor's name, mailing address and ZIP code
Diann Hannah
P.O. Box 277
Varney, WV 25696

Name of contributor's employer
Southside Mall

Contributor's occupation
Manager

Aggregate contributions year-to-date
$5000

Amount of contribution
$5000

Date of contribution
09/22/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1640500

Amount of contribution
$85000

Date of contribution
09/22/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1685500

Amount of contribution
$45000

Date of contribution
09/23/2004

Contributor's name, mailing address and ZIP code
Doctors for Justice
Prfocssional Center 1, Suite 301 Medical Park
Wheeling, WV 26003

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$745000

Amount of contribution
$745000

Date of contribution
09/27/20-04

Form 8872 (11-2002)

[redacted] Itemized Contributions Schedule B

Recipient's name, mailing address and ZIP code
Camel City Posters
428 Newsome Road P.O. Box 2409
King, NC 27021

Purpose of expenditure
Posters

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$5658

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
The Lamar Companies
P.O. Box 96030
Baton Route, LA 70896

Purpose of expenditure
Billboards

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$29360

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
Lamar Advertising
P.O. Box 96030
Baton Route, LA 70896

Purpose of expenditure
Billboards

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$5115

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
The Lamar Companie
P.O. Box 96030
Baton Rouge, LA 70896

Purpose of expenditure
Billboards

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$12188

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
Lamar Advertising of Wheeling
52610 Holiday Drive
St. Clairsville, OH 43950

Purpose of expenditure
Poster Contract Weir, Whg

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$6000

Date of contribution
08/23/2004

Recipeint's name, mailing address and ZIP code
Harry Outdoor Advertising
549 W. Main Street
Tazewell, VA 24651

Purpose of expenditure
Poster Display Beckley, Bluefield, between Princeton-Bluefield at Green Valley

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$2000

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
KVA Rental
P.O. Box 5158
Charleston, WV 25361-0158

Purpose of expenditure
Poster Display Charleston, Parkersburg, Morgantown

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$16606

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
Tri State Outdoor Media Group
P.O. Box 184
Ivel, KY 41642

Purpose of expenditure
Contract for Posted/Preprinted Displays Logan Co., Boone Co.

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$7500

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
State Republican Party
P.O. Box 2711
Charleston, WV 25330

Purpose of expenditure
Use of voter file

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$3000

Date of contribution
08/23/2004

Recipient's name, mailing address and ZIP code
Airam Media and Maria Walker
10 Hale Street Suite 100
Charleston, WV 25301

Purpose of expenditure
Phase 1 Media Buy 9/4 – 11/2

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$603535

Date of contribution
09/01/2004

Recipient's name, mailing address and ZIP code
WV Media – Attn: Jimmy Reed
13 Kanawha Boulevard, West
Charleston, WV 25302

Purpose of expenditure
Advertising Spots

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$396930

Date of contribution
09/01/2004

Recipient's name, mailing address and ZIP code
Chris Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of expenditure
Contracted for service

Name of recipient's employer
Self employed

Recipient's occupation
Self employed

Amount of contribution
$2400

Date of contribution
09/01/2004

Recipient's name, mailing address and ZIP code
Targeted Communications Strategies
P.O. box 2732
Charleston, WV 25330

Purpose of expenditure
Retainer for September

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$7500

Date of contribution
09/01/2004

Recipient's name, mailing address and ZIP code
Metro News
1111 Virginia Street, East
Charleston, WV 25301

Purpose of expenditure
Metro News Talkline; News Network

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$47000

Date of contribution
09/02/2004

Recipient's name, mailing address and ZIP code
Mercury Pulic Affairs
136 5th Alvenue 3rd Floor
New York, NY 10010

Purpose of expenditure
Media – "McGraw" TV & Radio Production Fee

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$20474

Date of contribution
09/09/2004

Recipient's name, mailing address and ZIP code
Targeted Communications
P.O. Box 2732
Charleston, WV 25330

Purpose of expenditure
Direct Mail Piece #1 (Arbaugh Decision)

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$219492

Date of contribution
09/09/2004

Recipient's name, mailing address and ZIP code
Airam Media and Maria Walker
10 Hale Street, Suite 100
Charleston, WV 25301

Purpose of expenditure
Phase II Media Buy 9/20 – 9/26

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$95755

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Chris Wesley Hamilton
947 Somerset Drive
Charleston, VA 25301

Purpose of expenditure
Contracted Service September 06-12 and 13-19

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of contribution
$1600

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Christopher Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of expenditure
Travel expense 08/08-09/05 and 09/06-09/12

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of contribution
$1267

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
The Lamar Companies
P.O. Box 96030
Baton Route, LA 70896

Purpose of expenditure
Billboards

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$5325

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Metro News
1111 Virginia St. East
Charleston, WV 25301

Purpose of expenditure
Metro News Talkline 09/20-10/01, News Network 09/20-10/03

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$47000

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
RMS Strategies
One Bride Place 10 Half Street, St. 100
Charleston, WV 25301

Purpose of expenditure
Voter Opinion Survey – August 2004

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$21200

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Rob Cornelius
162 Kanawha Boulevard East
Charleston, WV 25311

Purpose of expenditure
Contracted Services September 0-6-12 and 13-19

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of contribution
$1500

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Terradon Communications
P.O. Box 338
Nitro, WV 25143

Purpose of expenditure
Interactive Web Site, online donation system and a donation administration

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$2756

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Video Creations
434-B Grapview Drive
Charlestn, Wv 25306

Purpose of expenditure
Base Filming Fee, 4 hours filming

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$636

Date of contribution
09/15/2004

Recipient's name, mailing address and ZIP code
Airam Media and Maria Walker
10 Hale Street, Ste. 100
Charleston, WV 25301

Purpose of expenditure
Radio Media Buy

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$44604

Date of contribution
09/17/2004

Recipient's name, mailing address and ZIP code
Metro News
1111 Virginia Street East
Charleston, WV 25301

Purpose of expenditure
Metro News Talkline, News Network

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$94000

Date of contribution
09/22/2004

Recipient's name, mailing address and ZIP code
Airam Media and Maria Walker
10 Hale Street, Ste. 100
Charleston, WV 25301

Purpose of expenditure
Media Buy

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
459434

Date of contribution
09/27/2004

Recipient's name, mailing address and ZIP code
WV Media – Attn: Jimmy Reed
13 Kanawha Boulevard, West
Charleston, WV 25302

Purpose of expenditure
Advertising Spots

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$270695

Date of contribution
09/27/2004

Recipient's name, mailing address and ZIP code
Image
800 North Side Drive
Smmersville, WV 26651

Purpose of expenditure
Space Rental and Production Fee for Mahan, Medina, Walton, Muddlety & Princeton

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$9125

Date of contribution
09/09/2004

Recipient's name, mailing address and ZIP code
WV Media – Attn: Jimmy Reed
13 Kanawha Boulevard, West
Charleston, WV 25302

Purpose of expenditure
Advertising spots week of 09/20

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of contribution
$35720

Date of contribution
09/15/2004

Form 8872
(November 2002)
Department of the Treasury
Internal Revenue Service

Political Organization Report of Contributions and Expenditures

OMB No. 1545-1696

▶ See Separate Instructions

A. For the period beginning 10/01/2004 **and ending** 11/30/2004

B. Check applicable box:

- √ Initial report
- ___ Change of address
- ___ Amended report
- ___ Final report

1. Name of organization
And For The Sake Of The Kids

Employer identification number
20 - 1515424

2. Mailing address (P.O. Box or number, street, and room or suite number)
PO Box 1716

City or town, state, and ZIP code
Williamson, WV 25661

3. E-mail address or organization:
andforthesakeofthekids@yahoo.com

4. Date organization was formed:
08/20/2004

5a Name of custodian of records
Carl Hubbard

5b Custodian's address
322 Dry Hill Road
Beckley, WV 25801

6a Name of contact person
Carl Hubbard

6b Contact person's address
PO Box 1716
Williamson, WV 25661

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number
322 Dry Hill Road

City or town, state, and ZIP code
Beckley, WV 25801

8 Type of report (check only one box)

- ___ First quarterly report (due by April 15)
- ___ Second quarterly report (due by July 15)

____	Third quarterly report (due by October 15)
____	Year-end report (due by January 31)
____	Mid-year report (non-election year only-due by July 31)
____	Monthly report for the month of: (due by he 20th day following the month shown above, except the December report, which is due by January 31)
____	Pre-election report (due by the 12th or 15th day before the election) (1) Type of election: (2) Date of election: (3) For the state of:
√	Post-general election report (due by the 30th day after general election) (1) Date of election: 11/02/2004 (2) For the state of: WV

9	**Total amount of reported contributions (total from all attached Schedules A)** ..... 9.	$ 1117000
10	**Total amount of reported expenditures (total from all attached Schedules B)** ..... 10.	$ 1068690

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete

Sign Here ▶ /s/ Carl Hubbard ▶ 12/02/2004

Signature of authorized official — Date

Form 8872 (11-2002)
[redacted] Itemized Contributions Schedule A

Contributor's name, mailing address and ZIP code
Cecil I. Walker Machinery Company
PO Box 2427
Charleston, WV 25329

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$5000

Amount of contribution
$5000

Date of contribution
10/14/2004

Contributor's name, mailing address and ZIP code
Asset Holdings LLC
PO Box 15190
Marmet, WV 25365 - 0190

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$25000

Amount of contribution
$25000

Date of contribution
10/14/2004

Contributor's name, mailing address and ZIP code
WV Coal Association Inc.
P.O. Box 3923
Charleston, WV 25339

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$95000

Amount of contribution
$95000

Date of contribution
10/15/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1850500

Amount of contribution
$85000

Date of contribution
10/15/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1910500

Amount of contribution
$60000

Date of contribution
10/19/2004

Contributor's name, mailing address and ZIP code
Cecil I. Walker Machinery Co.
O Box 2427
Charleston, WV 25329

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$25000

Amount of contribution
$20000

Date of contribution
10/19/2004

Contributor's name, mailing address and ZIP code
WV Coal Association Inc.
PO Box 3923
Charleston, WV 25339

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$155000

Amount of contribution
$60000

Date of contribution
10/20/2004

Contributor's name, mailing address and ZIP code
Clay Communications
301 South Tryon St. PMB 35127
Charlotte, NBC 28202 - 1915

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$10000

Amount of contribution
$10000

Date of contribution
10/18/2004

Contributor's name, mailing address and ZIP code
Teresa Wicker
P.O. Box 776 Rt 65 Helena Drive
Delbarton, WV 25670

Name of contributor's employer
Thoroughbred Steakhouse

Contributor's occupation
Vice President

Aggregate contributions year-to-date
$5000

Amount of contribution
$5000

Date of contribution
10/15/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$2160500

Amount of contribution
$250000

Date of contribution
10/22/2004

Contributor's name, mailing address and ZIP code
WV Coal Association
P.O. Box 3923
Charleston, WV 25339

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$198000

Amount of contribution
$43000

Date of contribution
10/26/2004

Contributor's name, mailing address and ZIP code
Bennett Hatfield
P.O. Box 2405
Charleston, WV 25329 - 2405

Name of contributor's employer
Arch Coal Eastern Operations

Contributor's occupation
President

Aggregate contributions year-to-date
$3000

Amount of contribution
$3000

Date of contribution
10/28/2004

Contributor's name, mailing address and ZIP code
WV Coal Association
P.O. Box 3923
Charleston, WV 25339

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$223000

Amount of contribution
$25000

Date of contribution
11/03/2004

Contributor's name, mailing address and ZIP code
Chris Cline
430 Harper Park Drive
Beckley, WV 25801

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$30000

Amount of contribution
$30000

Date of contribution
11/03/2004

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$2460500

Amount of contribution
$300000

Date of contribution
10/25/2004

Contributor's name, mailing address and ZIP code
Sterling Trucking
Heritage Equipment Inc. 322 Dry Hill Road
Beckley, WV 25801

Name of contributor's employer
N/A

Contributor's occupation
N/A

Aggregate contributions year-to-date
$1000

Amount of contribution
$1000

Date of contribution
10/19/2004

Contributor's name, mailing address and ZIP code
Everett Hannah
P.O. Box 277
Varney, WV 25696

Name of contributor's employer
Hannah Lumber Company

Contributor's occupation
President

Aggregate contributions year-to-date
$5000

Amount of contribution
$5000

Date of contribution
10/22/204

Contributor's name, mailing address and ZIP code
Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

Name of contributor's employer
Massey Energy

Contributor's occupation
CEO

Aggregate contributions year-to-date
$1765500

Amount of contribution
$80000

Date of contribution
10/08/2004

Contributor's name, mailing address and ZIP code
James J. Powell
3622 Bristol Hwy
Johnson City, TN 37601

Name of contributor's employer
Powell Construction

Contributor's occupation
Owner

Aggregate contributions year-to-date
$15000

Amount of contribution
$15000

Date of contribution
10/08/2004

Form 8872 (11-2002)

[redacted] Itemized Contributions Schedule B

Recipient's name, mailing address and ZIP code
Chris Wesley Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of Expenditure
Retainers Week of 09/20-26 and 09/27-10/03

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$1600

Date of expenditure
10/01/2004

Recipient's name, mailing address and ZIP code
Justine Briggs
192 Nighbert Ave
Logan, WV 25601

Purpose of Expenditure
Campaign Sign Labor

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$100

Date of expenditure
10/01/2004

Recipient's name, mailing address and ZIP code
Megan Lowery
285 Riverside Drive
Logan, WV 25601

Purpose of Expenditure
Campaign Sign Labor

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$100

Date of expenditure
10/01/204

Recipient's name, mailing address and ZIP code
Rob Cornelius
162 Kanawha Boulevard East
Charleston, WV 25311

Purpose of Expenditure
Retainers Week of 09/20-26 and 09/27-10/03 and Expenses

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$2866

Date of expenditure
10/01/2004

Recipient's name, mailing address and ZIP code
Will Talbert
554 Earl Street
Charleston, WV 25302

Purpose of Expenditure
Campaign Sign Labor

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$100

Date of expenditure
10/01/2004

Recipient's name, mailing address and ZIP code
Targeted Communications Strategies
P.O. Box 2732
Charleston, WV 25330

Purpose of Expenditure
Advertisements

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$13000

Date of expenditure
10/01/2004

Recipient's name, mailing address and ZIP code
Conquest Communications Group
2812 Emerywood Pky Ste 103
Richmond, VA 25330

Purpose of Expenditure
55597 Northern Democrat ID

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$26687

Date of expenditure
10/08/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd Floor
New York, NY 10010

Purpose of Expenditure
Media, TV Creative Fee, Radio Creative Fee

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$22367

Date of expenditure
10/08/2004

Recipient's name, mailing address and ZIP code
Motion Masters Inc.
P.O. Box 1228
Charleston, WV 25321

Purpose of Expenditure
Convert DVCam tape to DVD, 3 DVD Copies, Project Coordination, shoot, etc. Recut Voiceover for TV Spot

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$2652

Date of expenditure
10/08/2004

Recipient's name, mailing address and ZIP code
RMS Strategies
One Bridge Place 10 Hale Street

Charleston, WV 25301

Purpose of Expenditure
Tracking Survey-Week One, September 20-24

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$16500

Date of expenditure
10/08/2004

Recipient's name, mailing address and ZIP code
Steptoe & Johnson PLLC
Sixth Floor, Bank One Center P.O. Box 2190
Clarksburg, WV 26302 - 2190

Purpose of Expenditure
Professional Services through August 31, 2004

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$7088

Date of expenditure
10/08/2004

Recipient's name, mailing address and ZIP code
Tareted Communications Strategies
P.O. Box 2732
Charleston, WV 25330

Purpose of Expenditure
Newspaper Ads

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$21570

Date of expenditure
110/08/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd Floor
new York, Ny 10010

Purpose of Expenditure
TV Production Fee, TV Creative Fee, Survey Development Fee

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$22715

Date of expenditure
10/14/2004

Recipient's name, mailing address and ZIP code
Chris Wesley Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of Expenditure
Retainer Week of 10/3-9, 10/10-16 and expenses

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$2154

Date of expenditure
10/14/2004

Recipient's name, mailing address and ZIP code
Rob Cornelius
162 Kanawha Blvd East
Charleston, WV 25311

Purpose of Expenditure
Retainer for services week of 10/3 and expense

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$1940

Date of expenditure
10/14/2004

Recipient's name, mailing address and ZIP code
Tareted Communications Strategies
P.O. Box 2732
Charleston, WV 25330

Purpose of Expenditure
Newspaper Ads, Bumper stickers, Soyuthern WV Radio Buy, Direct Mail

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$85583

Date of expenditure
10/14/2004

Recipient's name, mailing address and ZIP code
Airam Media
Maria Walker 10 Hale St Ste 100
Charleston, WV 25301

Purpose of Expenditure
TV – Southern WV

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$98698

Date of expenditure
10/15/2004

Recipient's name, mailing address and ZIP code
Conquest Communications Group
2812 Emerywood Pky Ste 103
Richmond, VA 23294 - 3718

Purpose of Expenditure
Southern Democrat ID, Statewide Republican ID

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$56588

Date of expenditure
10/15/2004

Recipient's name, mailing address and ZIP code
George M. Blankenship
129 W. Second Avenue
Williamson, WV 25661

Purpose of Expenditure
Accounting Service

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$2430

Date of expenditure
10/15/2004

Recipient's name, mailing address and ZIP code
International Sports Properties
140 Club Oaks Court
Winston-Salem, NC 27104

Purpose of Expenditure
Football Radio Broadcasts

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$5500

Date of expenditure
10/15/2004

Recipient's name, mailing address and ZIP code
Martinsburg Journal
P.O. Box 807 207 W. King Street
Martinsburg, WV 25402

Purpose of Expenditure
State Political

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$2490

Date of expenditure
10/15/2004

Recipient's name, mailing address and ZIP code
Airam Media
Maria Walker 10 Hale Street Ste. 100
Charleston, WV 25301

Purpose of Expenditure
WHSV-TV 10/25-11/1

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$24985

Date of expenditure
10/21/2004

Recipient's name, mailing address and ZIP code
WOWK TV
555 Fifth Ave
Huntington, WV 25701

Purpose of Expenditure
Half Hour Advertising Schedule WOWK, WTRF, WBOY, WVNS

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$24100

Date of expenditure
10/21/2004

Recipient's name, mailing address and ZIP code
Airam Media
Maria Walker 10 Hale Street Ste 100
Charleston, WV 25301

Purpose of Expenditure
WHAG-TV 10/23-10/24

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$49800

Date of expenditure
10/22/2004

Recipient's name, mailing address and ZIP code
WV Media
Jimmy Reed Kanawha Blvd W
Charleston, WV 25302

Purpose of Expenditure
Advertising

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$100000

Date of expenditure
10/22/2004

Recipient's name, mailing address and ZIP code
Airam Media
Maria Walker 10 Hale Street Ste 100
Charleston, WV 25301

Purpose of Expenditure
Haerstown-DC TV WHAG-TV WJLA-TV WUSA-TV WTTG-TV

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$300000

Date of expenditure
10/25/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd Floor
New York, NY 10010

Purpose of Expenditure
TV Production Fee, Radio Production Fee, TV Creative Fee, Dubs

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$42910

Date of expenditure
10/25/2004

Recipient's name, mailing address and ZIP code
Christopher Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of Expenditure
Tolls and Fuel

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$312

Date of expenditure
10/25/2004

Recipient's name, mailing address and ZIP code
Chris Wesley Hamilton
947 Somerset Drive
Charleston, WV 25311

Purpose of Expenditure
Retainer for Week of October 17, Retainer for Week of October 24

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$1600

Date of expenditure
10/29/2004

Recipient's name, mailing address and ZIP code
Rob Cornelius
162 Kanawha Blvd East
Charleston, WV 25311

Purpose of Expenditure
Retainer for Week of October 17, Retainer for Week of October 24 and Expenses

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$2414

Date of expenditure
10/29/2004

Recipient's name, mailing address and ZIP code
Artistic Promotions LLC
2306 Charles Avenue
Dunbar, WV

Purpose of Expenditure
Yard Signs

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$21640

Date of expenditure
11/01/2004

Recipient's name, mailing address and ZIP code
Conquest Communications Group
2812 Emerywood Pky Ste 103
Richmond, VA 23294 - 3718

Purpose of Expenditure
Automated Messages

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$13,201

Date of expenditure
11/01/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd Floor
New York, NY 10010

Purpose of Expenditure
TV Production Fee, TV Revisions, TV Creative Fee

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$26924

Date of expenditure
11/01/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd Floor
New York, NY 10010

Purpose of Expenditure
Revised and Rush Delivery

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$175

Date of expenditure
11/09/2004

Recipient's name, mailing address and ZIP code
Terradon Communications
P.O. Box 338
Nitro, WV 25143

Purpose of Expenditure
DNS Registration

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$41

Date of expenditure
11/09/2004

Recipient's name, mailing address and ZIP code
Chris Wesley Hamilton
947 Somerset Drive
Charleston, WV 25301

Purpose of Expenditure
Retainer for Week of November 1-7 and Retainer for week of November 8-12

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$1600

Date of expenditure
11/09/2004

Recipient's name, mailing address and ZIP code
Christopher Hamilton
947 somerset Drive
Charleston, WV 25301

Purpose of Expenditure
Expenses

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$176

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
George M. Blankenship
129 W. Second Avenue
Williamson, WV 25661

Purpose of Expenditure
Accounting Service

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$4735

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
Rob Cornelius
162 Kanawha Blvd East
Charleston, WV 25311

Purpose of Expenditure
Mileage and expenses

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$667

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
Steve H. Lucas
Rt. 4 Box 101
Charleston, WV 25312

Purpose of Expenditure
Campaign Signs

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$200

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
Targeted Communications Strategies
P.O. Box 2732
Charleston, WV 25330

Purpose of Expenditure
Video Recording/Editing, Infomercial Airtime, Commercial Airtime

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$4400

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
Will Talbert
554 Earl Street
Charleston, WV 25302

Purpose of Expenditure
Campaign Signs

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$200

Date of expenditure
11/12/2004

Recipient's name, mailing address and ZIP code
Adam S. Adkins
P.O. Box 186
Chauncy, WV 25612

Purpose of Expenditure
Campaign Signs

Name of recipient's employer
N/A

Recipient's occupation
Self Employed

Amount of expenditure
$400

Date of expenditure
11/22/2004

Recipient's name, mailing address and ZIP code
Mercury Public Affairs
137 5th Avenue 3rd floor
New York, NY 10010

Purpose of Expenditure
TV Production Fee, TV Creative Fee

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$19326

Date of expenditure
11/22/2004

Recipient's name, mailing address and ZIP code
Campaign Broadcast Services
6565 Spencer St Ste 208
Las Vegas, NV 89119

Purpose of Expenditure
Political Audodial Calls

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$5948

Date of expenditure
11/22/2004

Recipient's name, mailing address and ZIP code
Branch Banking & Trust
Second Avenue and Vinson Street
Williamson, WV 25661

Purpose of Expenditure
Bank Account Charge

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$46

Date of expenditure
10/21/2004

Recipient's name, mailing address and ZIP code
Branch Banking & Trust
Second Avenue and Vinson Street
Williamson, WV 25661

Purpose of Expenditure
Bank Account Charge

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$47

Date of expenditure
11/22/2004

Recipient's name, mailing address and ZIP code
Tareted Communications Strategies
P.O. Box 2732
Charleston, WV 25661

Purpose of Expenditure
Direct Mail, Audio Recording, Video Production

Name of recipient's employer
N/A

Recipient's occupation
N/A

Amount of expenditure
$30115

Date of expenditure
10/25/2004

Form 8872
(November 2002)
Department of the Treasury
Internal Revenue Service

Political Organization Report of Contributions and Expenditures

OMB No. 1545-1696

▶ See Separate Instructions

A. For the period beginning 12/01/2004 **and ending** 12/31/2004

B. Check applicable box:
- √ Initial report
- ___ Change of address
- Amended report
- ___ Final report

1. Name of Organization And For The Sake Of The Kids

Employer identification number 20 - 1515424

2. Mailing Address (P.O. Box or number, street, and room or suite number)
PO Box 1716

City or town, state, and ZIP code
Williamson, WV 25661

3. E-mail address or organization:
andforthesakeofthekids@yahoo.com

4. Date organization was formed:
08/20/2004

5a Name of custodian of records
Carl Hubbard

5b Custodian's address
322 Dry Hill Road
Beckley, WV 25801

6a Name of contact person
Carl Hubbard

6b Contact person's address
PO Box 1716
Williamson, WV 25661

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number
322 Dry Hill Road

City or town, state, and ZIP code
Beckley, WV 25801

8 Type of report (check only one box
- ___ First quarterly report (due by April 15)
- ___ Second quarterly report (due by July 15)

___	Third quarterly report (due by October 15)
√	Year-end report (due by January 31)
___	Mid-year report (non-election year only-due by July 31)
___	Monthly report for the month of: (due by he 20th day following the month shown above, except the December report, which is due by January 31)
___	Pre-election report (due by the 12th or 15th day before the election) (1) Type of election: (2) Date of election: (3) For the state of:
___	Post-general election report (due by the 30th day after general election) (1) Date of election (2) For the state of:

9	**Total amount of reported contributions (total from all attached Schedules A)**	**9. $ 0**
10	**Total amount of reported expenditures (total from all attached Schedules B)**	**10. $ 50900**

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

	/s/ Carl Hubbard	1/31/2005
Sign Here	▶ _____	▶ _____
	Signature of authorized official	Date

Form 8872 (11-2002)

[redacted] Itemized Contributions Schedule A

Form 8872 (11-2002)

[redacted] Itemized Contributions Schedule B

Recipient's name, mailing address and ZIP code
Adam Harris
Route 2 Box 454CC
Princeton, WV 24740

Purpose of expenditure
Campaign sign labor

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of Expenditure
$400

Date of expenditure
12/16/2004

Recipient's name, mailing address and ZIP code
Joshua A. Fuller
PO Box 903
laeger, WV 24844

Purpose of expenditure
Campaign sign labor

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of Expenditure
$400

Date of expenditure
12/16/2004

Recipient's name, mailing address and ZIP code
Steptoe & Johnson PLLC
PO Box 1732
Clarksburg, WV 26302

Purpose of expenditure
Professional services

Name of recipient's employer
N/AS

Recipient's occupation
Self employed

Amount of Expenditure
$49133

Date of expenditure
12/16/2004

Recipient's name, mailing address and ZIP code
George M. Blankenship
129 W. Second Avenue
Williamson, WV 25661

Purpose of expenditure
Accounting services

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of Expenditure
$947

Date of expenditure
12/21/2004

Recipient's name, mailing address and ZIP code
BB&T
Second Avenue and Vinson Street
Williamson, WV 25661

Purpose of expenditure
Bank charges

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of Expenditure
$6

Date of expenditure
12/17/2004

Recipient's name, mailing address and ZIP code
BB&TR
Second Avenue and Vinson Street
Williamson, WV 25661

Purpose of expenditure
Bank charges

Name of recipient's employer
N/A

Recipient's occupation
Self employed

Amount of Expenditure
$14

Date of expenditure
12/21/2004

September 13, 2004

Dear Dr.

You are paying too much for insurance! It's not just your medical liability coverage-it's your car and homeowners insurance, too. Additionally, you are paying for excessive insurance cost in almost every product or service you purchase.

The $250,000 malpractice liability cap hasn't helped yet while we wait for the Supreme Court to act on a challenge by trial lawyers. Many doctors complain that the insurance companies are gouging them. They can't understand why their insurance rates didn't drop when the cap was passed. Maybe the insurance companies are gouging doctors and maybe they're not. I don't know but the same insurance companies provide rates 80% lower to the same doctors if they'll just move out of West Virginia.

One thing is for certain! If Warren McGraw gets re-elected to the West Virginia Supreme Court your insurance rates will almost certainly be higher for the next twelve years than they will be if Brent Benjamin gets elected. The best and most amazing thing is that you can contain your own insurance rates. Yet, you can lower your own rates but in the past you've chosen not to do so. All you have to do is send $1000 to Brent Benjamin and "*then one other thing.*" If you and your spouse each contribute you can be double sure your insurance rates can drop.

Now, if better insurance rates for medical liability aren't enough for you there's more. One, you'll get better car insurance. Two, you get lower homeowner insurance. Three, you get more patients, and four, you'll be helping your neighbor. Quite a deal.

But if this isn't enough you'll get rid of a judge in McGraw who let a rapist of children out of jail. Yes, McGraw cast the deciding vote to release Tony Arbaugh. Arbaugh sexually abused 11 different children numerous times and yet McGraw voted to release him immediately rather than serving his sentence of 15-35 years. When did he do this? Just this past March. Arbaugh is now somewhere among the neighborhoods and playgrounds of West Virginia.

Send the money requested. Some doctors already have. One doctor and his wife combined sent and raised $5,000. If you did that it would cost you $34/month over the twelve year term McGraw seeks. You might save $2,000/month. Not a bad deal. If you only send $1000 it's $6.97/month. A "No-Brainer."

Remember no single check can exceed $1,000. The check must be individual not corporate. The money is needed immediately but by September 25th at the latest.

Oh, "*the one other thing*", register and vote and tell your friends, your patients and your co-workers to do the same.

Thanks in advance,

/s/

Don L. Blankenship
P.O. Box 294
Rawl, WV 25691

PS-See the attachment

STATE OF WEST VIRGINIA
CAMPAIGN FINANCIAL STATEMENT IN RELATION TO 2004 ELECTION YEAR

FOR USE BY INDIVIDUALS MAKING INDEPENDENT EXPENDITURES SUPPORTING OR OPPOSING CANDIDATES, COMMITTEES, POLITICAL PARTIES

Independent Expenditure is an expenditure by a person other than a candidate or committee for a communication which expressly advocates the election or defeat of a clearly identified candidate, but which is made independently of the candidate's campaign and without the cooperation or consent, or in consultation with, the candidate or the candidate's agents.

Please check appropriate box to indicate which report you are filing

☐ **Annual Report_____Calendar Year**
(Due last Saturday in March or within 6 days thereafter. This report filed for old campaigns or year following most recent election)

☒ **First General Report**
(Due first Saturday in September or within 6 days thereafter)

☐ **First Primary**
(Due last Saturday in March or within 6 days thereafter. This is the first report for current election year reporting)

☐ **Pre-general Report**
(Due 10 to 17 days before general or special election)

☐ **Pre-primary Report**
(Due 10 to 17 days before primary election)

☐ **Post-general Report**
(Due 25 to 31 days after general or special election)

☐ **Post-primary Report**
(Due 25 to 31 days after primary election)

☐ **Last minute primary or general report**
(Due within 24hrs after expenditure or debt incurred for

$500 or more after the eleventh day before an election, but more than 12 hours before)

Name	Don L. Blankenship
Phone Number	606-353-0928
Mailing Address	P.O. Box 294 Rawl, WV 25691

Expenditures made to support or oppose: (List candidate or political party)
Support candidacy of Brent Benjamin

Office sought/District (for candidates)	WV Supreme Court of Appeals

INSTRUCTIONS

1. On reverse side, list all expenditures made.
2. Complete oath below.
3. File within the prescribed filing period with the same filing officer as the candidate or committee files for financial reports:

- File with the **secretary of state** if you are a candidate (or a committee, person or agent supporting candidates) for an office on the ballot in more than one county or legislative office.
- File with the **county clerk** if you are a candidate (or a committee, person or agent supporting candidates) for county office or non-legislative office entirely within a county.
- File with the **municipal recorder** if you are a candidate (or a committee, person or agent supporting candidates) running for city office.

OATH OR AFFIRMATION

I, Don L. Blankenship, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement. I also swear or affirm that all expenditures listed were made using my own money, and that no money was received by any other individual, candidate, or committee.

/s/ Signature of individual authorized to make expenditures.

Official Form F-7B Issued by the Secretary of State (WV Code § 3-8-5)
Revised 7/03

ITEMIZED EXPENDITURES

List all expenditures.

DO NOT LIST ANY CONTRIBUTIONS MADE DIRECTLY TO THE CAMPAIGN OR COMMITTEE, OR CANDIDATE.

You may make extra copies of this page if needed.

Date

8/10/04

Expenditure made to: (List full name and address)

George Blankenship, CPA
129 West 2nd Avenue
Williamson, WV 25661

Purpose

Personal services; reimbursement to prepare and mail letters; postage; clerical and office expense; telephone and fax

Amount

$9,666.20

TOTAL EXPENDITURES $9,666.20

RECEIVED
04 SEP 14 PM 12:47
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

STATE OF WEST VIRGINIA
CAMPAIGN FINANCIAL STATEMENT IN RELATION TO 2004 ELECTION YEAR

FOR USE BY INDIVIDUALS MAKING INDEPENDENT EXPENDITURES SUPPORTING OR OPPOSING CANDIDATES, COMMITTEES, POLITICAL PARTIES

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(Due 25 to 31 days after primary election)

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(Due within 24hrs after expenditure or debt incurred for

$500 or more after the eleventh day before an election, but more than 12 hours before)

Name	Don L. Blankenship
Phone Number	c/o 304-235-3634
Mailing Address	Rural Route 49 Sprigg, WV 25693

Expenditures made to <u>support</u> or oppose: (List candidate or political party)
Brent Benjamin

Office sought/District (for candidates)	WV Supreme Court of Appeals

INSTRUCTIONS

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- File with the **county clerk** if you are a candidate (or a committee, person or agent supporting candidates) for county office or non-legislative office entirely within a county.
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/s/ Signature of individual authorized to make expenditures.

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Revised 7/03

ITEMIZED EXPENDITURES

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Date
10/21/04
Expenditure made to: (List full name and address)
West Virginia Hospital Association
100 Association Drive
Charleston, WV 25311
Purpose
West Virginia State Board Of Nursing Mailing Labels
Amount
$350.00

Date
10/21/04
Expenditure made to: (List full name and address)
George M. Blankenship, CPA
129 W. Second Avenue
Williamson, WV 25661
Purpose
Accounting Service
Amount
$16,253.67

Date
10/22/04
Expenditure made to: (List full name and address)
Lisa R. Adkins
Box 137
Omar, WV 25638

Purpose
Communications distribution-flyers, etc. supporting Benjamin
Amount
$324.00

Date
10/22/04
Expenditure made to: (List full name and address)
Mary Rose
P.O. Box 95
Sarah Ann, WV 25644
Purpose
Communications distribution-flyers, etc. supporting Benjamin
Amount
$324.00

Date
10/26/04
Expenditure made to: (List full name and address)
WBTH
P.O. Box 2200
Pikeville, KY 41501
Purpose
Ads
Amount
$2,520.00

Date
10/26/04
Expenditure made to: (List full name and address)
WXCC
P.O Box 2200
Pikeville, KY 41501

Purpose
Ads
Amount
$4,910.00

Date
10/26/04
Expenditure made to: (List full name and address)
Logan Broadcasting Corp.
Logan, WV 25601
Purpose
Ads
Amount
$5,475.00

Date
10/28/04
Expenditure made to: (List full name and address)
Campaign Broadcasting Service
6565 Spencer Street, Suite 210
Las Vegas, NV 89119
Purpose
Telecommunication Calls
Amount
$28,000.00

Sub TOTAL EXPENDITURES $58,156.67

ITEMIZED EXPENDITURES

List all expenditures.

DO NOT LIST ANY CONTRIBUTIONS MADE DIRECTLY TO THE CAMPAIGN OR COMMITTEE, OR CANDIDATE.

You may make extra copies of this page if needed.

Date
10/28/04
Expenditure made to: (List full name and address)
Airam Media
Maria Walker
10 Hale Street, Suite 100
Charleston, WV 25601
Purpose
Advertising
Amount
$250,000.00

Date
10/28/04
Expenditure made to: (List full name and address)
Campaign Broadcasting Service
6565 Spencer Str., Suite 210
Las Vegas, NV 89119
Purpose
Telecommunications Calls
Amount
$67,090.00

Date
10/29/04
Expenditure made to: (List full name and address)
Targeted Communications Strategies
P.O. Box 2732
Charleston, WV 25330
Purpose
Newspaper Ads

Amount
$43,760.00

Date
10/29/04
Expenditure made to: (List full name and address)
Williamson Daily News
P.O. Box 1660
Williamson, WV 25661
Purpose
Advertising
Amount
$922.35

Date
10/29/04
Expenditure made to: (List full name and address)
The Logan Banner
Logan, WV 25601
Purpose
Advertisement
Amount
$999.75

Date
10/29/04
Expenditure made to: (List full name and address)
WJLS AM/FM
Beckley, WV
Purpose
Advertisement
Amount
$204.00

Date
10/29/04

Expenditure made to: (List full name and address)
WMTD
Beckley, WV
Purpose
Advertising
Amount
$1,080.00

Date
10/29/04
Expenditure made to: (List full name and address)
RMS Strategies
One Bridge Place
10 Hale Street 100
Charleston, WV 26301
Purpose
Voter Opinion Survey
Amount
$8,745.00

Sub TOTAL EXPENDITURES $372,801.10

Sub-Total Pages 1 & 2 $430,957.77

ITEMIZED EXPENDITURES

List all expenditures.

DO NOT LIST ANY CONTRIBUTIONS MADE DIRECTLY TO THE CAMPAIGN OR COMMITTEE, OR CANDIDATE.

You may make extra copies of this page if needed.

Date
10/29/04
Expenditure made to: (List full name and address)
WXCC Radio
Williamson, WV 25661
Purpose
Advertising
Amount
$148.10

Date
10/29/04
Expenditure made to: (List full name and address)
Lisa R. Adkins
Box 137
Omar, WV 2638
Purpose
Communications distribution-flyers, etc. supporting Benjamin
Amount
$356.00

Date
10/29/04
Expenditure made to: (List full name and address)
Mary A. Rose
P.O. Box 95
Sarah Ann, WV 25644
Purpose
Communications distribution-flyers, etc. supporting Benjamin

Amount
$354.00

Date
11/02/04
Expenditure made to: (List full name and address)
Lisa R. Adkins
Box 137
Omar, WV 25638
Purpose
Communications distribution-flyers, etc. supporting Benjamin
Amount
$206.00

Date
11/2/04
Expenditure made to: (List full name and address)
Mary A. Rose
P.O. Box 95
Sarah Ann, WV 25644
Purpose
Communications distribution-flyers, etc. supporting Benjamin
Amount
$170.00

Date
11/4/04
Expenditure made to: (List full name and address)
Conquest Communications Group
2812 Emerywood PKY Ste 103
Richwood, VA 23294-3718
Purpose
Advertising

Amount
$5,753.76

Date
11/8/04
Expenditure made to: (List full name and address)
Conquest Communications Group
2812 Emerywood PKY Ste 103
Richmond, VA 23294-3718
Purpose
WV Mail Follow-Up Program
Amount
$500.00

Date
11/8/04
Expenditure made to: (List full name and address)
George M. Blankenship
129 W. Second Avenue
Williamson, WV 25661
Purpose
Accounting Services
Amount
$3,287.50

SUBTOTAL EXPENDITURES $10,775.36

Sub-Total Pages 1-3 $441,733.13

ITEMIZED EXPENDITURES

List all expenditures.

DO NOT LIST ANY CONTRIBUTIONS MADE DIRECTLY TO THE CAMPAIGN OR COMMITTEE, OR CANDIDATE.

You may make extra copies of this page if needed.

Date
11/11/04
Expenditure made to: (List full name and address)
George M. Blankenship, CPA
129 W. Second Avenue
Williamson, WV 25661
Purpose
Accounting Service
Amount
$23,076.53

Date
11/15/04
Expenditure made to: (List full name and address)
Campaign Broadcasting Service
6565 Spencer Str. Suite 210
Las Vegas, NC 88119
Purpose
Telecommunication Calls
Amount
$22,062.20

Date
11/18/04
Expenditure made to: (List full name and address)
Steptoe & Johnson
Attorneys at Law
P.O. Box 1732
Clarksburg, WV 26302-1732
Purpose
Personal Consulting

Amount
$21,169.47

SUBTOTAL EXPENDITURES $66,308.20

TOTAL PAGE 1-4 **$508,041.33**

Payment to Lisa Adkins and Mary Rose was made on checks issued by Leon Election Services, a one-member LLC established by Don L. Blankenship

STATE OF WEST VIRGINIA
CAMPAIGN FINANCIAL STATEMENT (LONG FORM)
IN RELATION TO 2004 ELECTION YEAR

For political committees, list the current election year. For candidates, list the current campaign or the year of an open past campaign.

Supply all information requested. It is required by WV Code §3-8-5a.

Benjamin for Supreme Court	Lora Abernathy, Treasurer
Candidate or Committee Name Republican	Candidate or Committee's Treasurer P.O. Box 1869
Political Party (for candidates) Justice of the WVSCA	Treasurer's Mailing Address (Street, Route or P.O. Box) Charleston, WV 25327 304-344-0056
Office Sought (for candidates) District/Division	City, State, Zip Code Daytime Phone #

Reporting Period (check one)

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(Due last Saturday in March or within 6 days thereafter. This report filed for old campaigns or year following most recent election)

☒ **First General Report**
(Due first Saturday in September or within 6 days thereafter)

☐ ***Amended Report*** *(check if applicable)*
You must also check one box of appropriate reporting period

☐ **First Primary**
(Due last Saturday in March or within 6 days thereafter. This is the first report for current election year reporting)

☐ **Pre-general Report**
(Due 10 to 17 days before general or special election)

☐ **Pre-primary Report**
(Due 10 to 17 days before primary election)

☐ **Post-general Report**
(Due 25 to 31 days after general or special election)

☐ **Post-primary Report**
(Due 25 to 31 days after primary election)

☐ **Final Report**
(Zero balance required. PAC must also file Form Forn F-6 Dissolution)

* *post general may also be final report if "0" balance*

REPORT TOTALS

Fill in totals after you complete pages for contributions, fundraisers, other income, in-kind contributions, loans, expenditures, unpaid bills.

CONTRIBUTIONS OF MONEY	**Totals for this Period**
1. Contributions – Schedule 1A	259,784.00
2. Fund-raising Events – Schedule 2A	81,420.00
3. **TOTAL CONTRIBUTIONS** (Add lines 1 and 2)	341,204.00
4. Other Income – Schedule 3A	0
5. Loans received – Schedule 1B	0
6. **TOTAL OTHER INCOME** – (Add lines 4 and 5)	0
7. In-kind (non-cash) contributions – Schedule 4A	0

EXPENDITURES	
8. Itemized Expenditures – Schedule 2B	171,175.93
9. Loan Repayent – Schedule 1B	0
10. **TOTAL**	

EXPENDITURES (Add lines 8 and 9)	171,175.93

OUTSTANDING LOANS/DEBTS

11. Unpaid Bills - Schedule 3B	1,699.03
12. Outstanding Loans – Schedule 1B	16,250.00
13. **TOTAL DEBTS –** (Add lines 11 and 12)	17,949.03

CASH BALANCE SUMMARY

A. Beginning Balance (ending balance from previous report)	11,171.40
B. Total Receipts (Add lines 3 & 6	341,204.00
C. Subtotal (Add lines A & B)	352,375.40
D. Total Expenditures (Line 10)	171,175.93
E. Ending Balance (Subtract line D from line C)	181,199.47

**Cannot be negative balance*

TOTAL RECEIPTS
ELECTION YEAR-TO-DATE
(Add line B from all reports)

366,479.00

TOTAL EXPENDITURES
ELECTION YEAR-TO-DATE
(Add line D from all reports)

185,278.93

Official Form
F-7
Revised 7/03

Issued by the WV State Election Commission
(WV Code §3-8-5)

SCHEDULE 1A	CONTRIBUTIONS $250.00 OR LESS *(For information about contributions, see General Instructions, Page 3.)*	
DATE	CONTRIBUTOR'S FULL NAME OR COMMITTEE'S NAME	AMOUNT
	See Attached Sheets	

BEST AVAILABLE COPY

205a

Schedule 1A - Contributions Less Than $250.00

7/12/04	Edward	J.	George		$250.00
6/25/04	W	P	Holloway	Jr.	$250.00
7/18/04	E.	Glenn	Robinson		$100.00
7/18/04	H.	L.	Snyder		$25.00
7/19/04	Charles	W.	Green		$20.00
7/21/04	Paul	S.	Barbery		$700.00
8/4/04	James	M.	Clark		$100.00
8/12/04	David	C.	Peterson		$100.00
7/27/04	John	M.	Sherwood		$100.00
7/29/04	Jenny		Overton		$250.00
7/30/04	Dale	D.	Walter		$200.00
7/30/04	J.	Grant	McGuire		$100.00
8/3/04	Jeffrey	A.	Kimble		$150.00
8/3/04	Kenneth	W.	Bailey		$100.00
8/3/04	Andrew	M.	Warner		$20.00
8/4/04	Allan	L.	McVey		$250.00
8/5/04	R.	T.	Rogers		$100.00
8/6/04	Vicki		Rhodes		$50.00
8/6/04	William	D.	Hamilton		$250.00
8/18/04	Kim	Brown	Poland		$200.00
8/18/04	William	H.	Blanks	Jr.	$100.00
8/18/04	Cathy		Fincham		$100.00
8/18/04	Larry	E.	Palmer		$100.00
8/10/04	Hiram		Mahan		$200.00
8/11/04	Katherine	W.	Keezy		$200.00
8/12/04	W.	K.	Snodgrass		$200.00
8/13/04	Timothy	E.	Comer		$100.00
8/13/04	Mary	M.	Boyle		$100.00
8/17/04	Max	M.	Allen		$250.00
8/17/04	George		Seamon	Jr.	$100.00
8/17/04	Stephen	C.	Goodnot		$50.00
8/17/04	Kevin		Veney		$200.00
8/17/04	Mark	A.	White		$200.00
8/17/04	Claudette	L.	Hudson		$250.00
8/17/04	R.	L.	Wharton		$100.00
8/17/04	Thomas	R.	Douglas		$200.00
8/17/04	John	S.	Oates		$200.00
8/19/04	Daniel	H.	Dawkins		$150.00
8/19/04	Peter	S.	White		$100.00
8/19/04	Thomas	A.	Gilliam		$100.00
8/20/04	Republican Executive Committee of Wetzel County				$100.00
8/21/04	Michael	A.	Fortunato		$250.00
8/23/04	C.	C.	McCoy	II.	$100.00
8/23/04	Mark	A.	Mangano		$50.00
8/24/04	Douglas	P.	Thompson		$100.00
8/30/04	David		Burgard		$199.00
9/2/04	Ray		Crabtree		$250.00
9/3/04	Jimmy	D	Phillips		$200.00
9/3/04	Calvin	R.	Kidd		$50.00

Schedule 1A - Contributions Less Than $250.00

9/3/04	Averill	R.	Perdue		$250.00
9/3/04	Gregory	D.	Patterson		$200.00
9/3/04	Jesse	R.	Sayre		$20.00
9/3/04	C.	Adam	Tacey		$100.00
9/3/04	Jim		Deem		$50.00
9/3/04	Gary	L.	Powell		$250.00
					$7,884.00

SCHEDULE 1A	CONTRIBUTIONS OVER $250.00	
	(For information about contributions, see General Instructions, Page 3.)	
DATE	INDIVIDUAL CONTRIBUTOR OR COMMITTEE'S NAME *By law, you must report an individual contributor's occupation and business affiliation. For a committee, you must report the affiliation (the group, association, corporation, or union with which it is connected.)*	AMOUNT
	Full Name: Address: See Attached Sheets Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED	Subtotal contributions of more than $250.00	
	Subtotal contributions of $250.00 or less	
	(Enter Total on Page 1, line 1) Total	

Contributions Over $250.00
Benjamin for Supreme Court Committee

6/1/04	David Young	Post Office Box 1791	Charleston	WV	25326	$500.00	Attorney	Self
6/1/04	William C. Forth	409 United Center	Charleston	WV	25301	$1,000.00	Attorney	Robinson McElwee
7/7/04	Don Blankenship	Post Office Box 927	Ashby	KY	41314	$1,000.00	President	Massey Coal
7/7/04	Thomas W. Dyer	1st Courage Team	Charleston	WV	25301	$1,000.00	Representative	Representative
7/7/04	REMPAC	100 Association Drive	Charleston	WV	25311	$1,000.00	PAC	
7/7/04	Caudle B. Toledo	1623 London Heights Road	Charleston	WV	25314	$1,000.00	Homemaker	
7/14/04	WAPAC	Post Office Box 1326	Charleston	WV	25324	$1,000.00	PAC	
7/15/04	Charles E. Maffioni	405 Silverwood Road	Charleston	WV	25314	$500.00	Attorney	Robinson Maffioni
7/15/04	WV Trade Corp	8 Capitol Street, Suite 700	Charleston	WV	25301	$1,000.00	PAC	
7/15/04	WV Oil Marketers & Grocers Assn.	1550 Kanawha Boulevard E.	Charleston	WV	25311	$1,000.00	PAC	
7/21/04	F. F. Graff	Post Office Box 1446	Charleston	WV	25325	$1,000.00	Attorney	Bowles, McDavid
7/21/04	Carl D. Andrews	Post Office Box 3246	Charleston	WV	25333	$1,000.00	Attorney	Bowles Rice
7/21/04	Paul Michael Pinsky	1063 Dartmouth Circle	Charleston	WV	25314	$1,000.00	Attorney	Bowles Rice
7/27/04	Robert E. Wentzel	Route 1, Box 197L	Lumberport	WV	26386	$500.00		
7/27/04	Lee A. Venable, Jr.	213 Via Del Mar	Palm Beach	FL	33480	$1,000.00	Retired	Venable & Grogan
7/27/04	John A. Wade, Jr.	3 Orchard Lane	Palm Pleasant	WV	25550	$1,000.00	Physician/Dermatologist	Self
7/27/04	WVEPA	405 10th Street	Charleston	WV	25330	$2,000.00	PAC	
7/27/04	Dana L. Warren	Arbor 1, Box 332	Clarksburg	WV	26301	$1,000.00	Physician	Self
7/27/04	James J. Powell	204 E. Sterling Lane	Berkley	WV	25401	$2,000.00		
7/28/04	Douglas E. McElhinny	436 Edenfield Drive	Bridgeport	WV	26330	$1,000.00	Physician/Executive	Self
7/29/04	Danny A. Watts	2816 Whitney Road	Huntington	WV	25705	$1,000.00		
7/29/04	Phillip R. Cline	Post Office Box 110	Huntington	WV	25706	$2,000.00	General Manager	Radiance Hotel
7/29/04	T. Morgan Mowery	5024 S.S. Island Ferry Lane	Brant	FL	34294	$1,000.00	Retired	
7/30/04	David B. Allen	Post Office Box 370	North Matewan	WV	25648	$1,000.00	Owner	Allen Supply
7/30/04	Jerry Lee Young	379 Rocky Step road	Winfield	WV	25213	$1,000.00	President	G&O Builders
8/1/04	C. F. Gheverly	Box 168	Kenova	WV	25674	$1,000.00		
8/1/04	Alex B. Mollohan	6045 E/Ac Lane	Huntington	WV	25705	$1,000.00	Vice President	Alcon Lab
8/1/04	Jerry W. Dillon	159 Pelton Terrace	Ashaway	WV	25049	$500.00		
8/1/04	Christine Rumsey	Box 168, Route 52 North	Kenova	WV	25674	$1,000.00		
8/4/04	AGCEMPAC	3Skyline One - Suite 300	St. Louis	MO	63141	$1,000.00	PAC	
8/4/04	Michael A. Cavalier	Post Office Box 943	Athens	WV	24712	$500.00		
8/4/04	Pamela Jo Bond	1614 Kirkbee Road	Charleston	WV	25314	$1,000.00		
8/4/04	Raymond L. Fenn	1387 Penny Lane	Vienna	WV	26105	$500.00		
8/5/04	David R. Hayes	3 Hidden Valley, #AA	Chapmanville	WV	25508	$1,000.00		
8/6/04	Dave Hajer	Post Office Box 423	Holden	WV	25625	$1,000.00		
8/6/04	Billy Ray Young, Jr.	Box 2253	Williamson	WV	25661	$1,000.00		
8/6/04	Jerry P. Hughes	Route 1, Box 154	Chapmanville	WV	25508	$1,000.00		
8/6/04	Timothy Miller	Post Office Box 486	Logan	WV	25601	$1,000.00		

Blank Contribution to Pinsons
Gun Advertiser Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

6/6/96	Danny Cox	220 Hidden Valley	South Dayton	WV	26562	$1,000.00	VP Zirkind Affiliates	Massey Coal Services
6/6/96	Douglas McCloud	55 Redbirch Road	Chapmanville	WV	25508	$1,000.00		
6/6/96	Allyson Puccillo	Post Office Box 461	Holden	WV	25625	$1,000.00		
6/6/96	Camillo Puccioli	Route 119, Box 661	Holden	WV	25625	$1,000.00		
6/6/96	Judi McCloud	55 Redbirch Road	Chapmanville	WV	25508	$1,000.00		
6/6/96	Arnold Mayo	Post Office Box 0	Holden	WV	25625	$1,000.00		
6/6/96	Mason E. Mayo	5 Crosby Branch Road	Chapmanville	WV	25508	$1,000.00		
6/6/96	Sandra Mayo	Post Office Box 623	Holden	WV	25625	$1,000.00		
6/6/96	David Mayo	2 Hidden Valley #11	Chapmanville	WV	25508	$1,000.00		
6/6/96	Charles A. Young	140 Airport Road	Williamson	WV	25661	$2,000.00		
6/6/96	Leonard McCoy	Route 1, Box 215C	Williamson	WV	25661	$2,000.00		
6/6/96	Christopher B. Young	Post Office Box 617	Williamson	WV	25661	$2,000.00		
6/6/96	Billy Ray Young, Jr.	Post Office Box 617	Williamson	WV	25661	$2,000.00		
6/6/96	Freddie A. Mayo	Post Office Box 461	Holden	WV	25625	$2,000.00		
6/6/96	Jean A. Adkins	333 Rocky Ape Drive	Winston Salem	NC	27107	$2,000.00		
6/6/96	Kenneth L. White	4000 E Oak Street	Evansville	IN	47715	$1,000.00		
6/6/96	Carl F. Grant	2125 W Highway 42	La Grange	KY	40031	$300.00		
6/6/96	Billie R. Taylor	1710 Ashmore Drive	Evansville	IN	47725	$1,000.00		
6/6/96	John E. Bentley	309 Smithbranch Drive	Evansville	IN	47711	$2,000.00		
6/6/96	John F. Lolley	Post Office Box 309	Evansville	IN	47703	$2,000.00		
6/6/96	Jo Bentley	302 Hathermann	Louisville	KY	40	$1,000.00		
6/6/96	Ray E. Hamilton	3411 Marth Road	Newburgh	IN	47630	$1,000.00		
6/6/96	Thomas W. Addy	7650 Oscar Gary Street	Newburgh	IN	47630	$2,000.00		
6/6/96	Mark E. Childers	Post Office Box 781	Gallipolis	WV	25637	$2,000.00		
6/6/96	Tony R. Hilton	Post Office Box 673	Williamson	WV	25661	$2,000.00		
6/6/96	Tony Dalen	Post Office 119	Mahanoy	PA	17831	$2,000.00	President	Contempra Services Corporation
6/6/96	Robert E. Simpson, Jr.	1000 Edgewood Drive	Charleston	WV	25302	$2,000.00	Attorney	Simpson & Gibraltar
6/6/96	Darrell M. Penn	Post Office Box 324	South Dayton	WV	25393	$2,000.00		
6/6/96	Chad E. Boettner	19709 Bengtson Place	Huntington	IN	47630	$1,000.00		
6/6/96	Jay Bob Mary	930 Cane Branch Road	Bellefonte	KY	41230	$1,000.00		
6/6/96	A. Mildred Chadwell	3317 Indie Creek Road	Mildred	KY	40457	$1,000.00		
6/6/96	Tiffany F. Bentley	Post Office Box 431	Holden	WV	25625	$1,000.00		
6/7/96	John Hatfield	3410 Chesterfield Avenue	Charleston	WV	25304	$1,000.00		
6/18/96	Joseph F. Smith	Post Office Box 984	South Point	OH	45680	$1,000.00		
6/13/96	Jack A. Raese, Jr.	600 Hidden Road	Gallipolis	PA	15129	$750.00		
6/13/96	Michael P. Orlando	300 Fredric Lane	Cheswick	PA	15024	$750.00		
6/13/96	Frank Orlando, Jr.	Post Office Box 111233	Pittsburgh	PA	15238	$1,000.00		
6/13/96	Mitchell S. Rainey	6901 Bartram Drive	Knoxville	TN	37909	$750.00		
6/13/96	Gary E. Ferrell	Post Office Box 950	Richmond	KY	40476	$1,000.00		

Blank Designation in Process
See Attached Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

9/1/2004	Linnea Benny	2543 Island Creek Road	Pikeville	KY	41501	$2,000.00	Asst. Dir./Executive	Massey Coal Services
9/1/2004	Tammy Belyea	4333 Partridge Drive	Williamson	WV	25661	$1,000.00	Housewife	
9/1/2004	Mona S. Hall	Rt. 1, Box 213A	Williamson	WV	25661	$1,000.00	President	Dellmona Mining
9/1/2004	Dan Columbo	Post Office Box 11237	Pittsburgh	PA	15238	$750.00		
9/1/2004	Jim Rogers	Box 163	Pikeville	KY	41501	$1,000.00		
9/1/2004	Justin D. Shaw	483 Cedar Creek Road	Pikeville	KY	41501	$1,000.00		
9/1/2004	Marcus A. Hayes, II	207 Hitchcock Way	High Point	NC	27262	$2,000.00		
9/1/2004	Jimmy Rogers	Post Office Box 162	Pikeville	KY	41502	$2,000.00		
9/1/2004	Betsy Johnson	643 Forest Hills Road	Forest Hills	KY	41527	$1,250.00	Massey Coal Services	
9/1/2004	John Masters	Post Office Box 148	Sidney	KY	41564	$500.00	Controller	Revel Sales
9/1/2004	David V. Dodd	Post Office Box 3049	Charleston	WV	25331	$1,000.00		
9/1/2004	John V. Adkins	Post Office Box 216	Dunlow	WV	25511	$2,000.00		
9/1/2004	Randal E. Dodd	Post Office Box 416	Landy	KY	41131	$2,000.00		
9/2/2004	Carl Hall	Post Office Box 277	Lenoir	WV	25401	$2,000.00		
9/1/2004	Carl Douglas Hall	Post Office Box 56	Lenoir	WV	25476	$2,000.00		
9/1/2004	Colby Hatten	Post Office Box 468	Williamsburg	KY	41858	$900.00	President	Long Fork Coal Company
9/1/2004	Steve Pelfrey	Post Office Box 668	Holden	WV	25625	$750.00	Director	Massey Coal
9/1/2004	Kendall Beckham	Three Commercial Place	Norfolk	VA	23510	$1,000.00	PAC	
9/1/2004	Consolidated Woods	Post Office Box 250	Ragland	WV	25469	$1,000.00	Director	Coalfax and Construction
9/1/2004	Danny Thacker	812 Ambassadore Road	Knoxville	TN	37923	$1,000.00		
9/1/2004	Ron Woods	Post Office Box 130	Ragland	WV	25469	$2,000.00	President/Director	Pocahontas Elkhorn Coal, Coalfax & Con.
9/1/2004	Michael E. Snelling	4888 Emerson Avenue, E.E.	Charleston	WV	25304	$2,000.00	Southern Mine Director	Massey Coal
9/1/2004	Sandra Pruitt	RR 2, Box 230	DeQueen	WV	25470	$1,000.00	Housewife	PAC
9/1/2004	Orenda Wilson	2960 Shoal Hill Parkway	Birmingham	AL	35223	$1,000.00		
9/1/2004	Dallas A. Lucille	309 Beaumont Court	Post Wright	KY	41011	$1,000.00	Owner	Dallas Equipment
9/1/2004	Anthony F. Adkins	705 Anthony Street	Williamson	WV	25661	$1,000.00	Operations	Dellmona
9/1/2004	Donald Phillip Slade	Box 307	Delbarton	WV	25670	$1,000.00		
9/1/2004	Charles A. Adkins	2824 Pumpkintown Road	Birmingham	AL	35243	$1,000.00		
9/1/2004	Samuel C. Woods	RR 2, Box 230	DeQueen	WV	25470	$1,000.00	Garden Technician	Production Millenium Corp.
9/1/2004	Elbo Thomas Hall	Post Office Box 351	Delbarton	WV	25670	$1,000.00	Operation Manager	Production Millenium Corporation
9/1/2004	Gary L. Self	3826 Legacy Lakes	Birmingham	AL	35243	$2,000.00		
9/1/2004	WEEPAC	Box 4100	Charleston	WV	25364	$1,000.00	PAC	
9/1/2004	William V. McClanahan	131 Juniper Street	Beckley	WV	25801	$500.00	Business Manager	Highland Mahalmay Corp.
9/1/2004	H. Daniel Hunt, Jr.	1660 Lexington Drive	Charleston	WV	25302	$2,000.00	Chairman/Director/Ch	Massey Coal Services
9/1/2004	Richard A. Bowen	Post Office Box 307	Charleston	WV	25302	$500.00	President	Self
9/1/2004	Leigh M. Hymes	717 Park Ridge Circle	Birmingham	AL	35243	$2,000.00	CFO	Hobson Brothers, Inc.
9/1/2004	Richard L. Higginbotham	16 Harewood Circle	Dunbar	WV	25064	$500.00	Insurance Agent	Orange Friedlander Company
9/1/2004	Duane P. Phillips, Jr.	10210 Whitehall Drive	Richmond	VA	23233	$1,000.00	Senior Vice President	Massey Energy
9/1/2004	Harry H. Edmondson, III	Post Office Box 1210	Wayne	WV	25570	$1,000.00		

Blank Designation in Purpose
Box Allocated Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

8/17/04	Shelley E. Leslie	Post Office Box 210	Forest Hills	KY	41527	$1,000.00		
8/17/04	Paul D. Gates	139 Cedar Hills Drive	Pikeville	KY	41501	$1,000.00	Industrial	Pikeville Legal
8/17/04	Victor Keith Hinton	17 Hobson Branch Road	Chapmanville	WV	25508	$2,000.00		
8/17/04	Randy Chapman	530 Pine Court	Ashland	KY	41101	$1,000.00	Owner	CS&C
8/17/04	Marshall F. Bishop	1116 N. Greystone Drive	Morgantown	WV	26505	$1,000.00		
8/17/04	Bryan Doty	Post Office Box 118	Naugatuck	WV	25485	$2,000.00	Contractor	Self-Employed
8/17/04	Richard	Post Office Box 3	Chapmanville	WV	25508	$2,000.00		
8/17/04	D. Stephen Walker	1410 Cottrell Road	Charleston	WV	25314	$500.00	Owner	Walker Machinery
8/17/04	Harold D. Osborne	81 Wilson Drive	South Williamson	KY	41503	$500.00	President	Lenora Land Company
8/17/04	Ralph Randall Hogg	Post Office Box 2102	Williamson	WV	25661	$1,000.00		
8/17/04	William Stone	Box 290	Danville	W V	25053	$500.00	Owner	J&B Repairs
8/17/04	Philip L. Wilson	100 Paradise Lane	Mount Nebo	WV	26679	$1,000.00		
8/17/04	Michael L. Calloway	Post Office Box 388	Cassus	WV	26602	$1,000.00	Plant Supervisor	Power Mountain Coal Company
8/17/04	L. W. Hamilton, Jr.	Dorcas 930	Lewisburg	WV	24901	$1,000.00	Retired	Ford Coal
8/17/04	Susan White	1041 Jones Avenue	Oak Hill	WV	25901	$1,000.00		
8/17/04	J. Tomasik Kokoel	703 Forest Hills Road	Forest Hills	KY	41227	$1,000.00		
8/17/04	Tommy G. Sheehan	Post Office Box 168	Mount Hope	WV	25880	$1,000.00		
8/17/04	Raymond L. Miles	228 Riverview Way	Elkview	WV	25071	$1,000.00	Vice President	Mooney Coal Service
8/17/04	J. Timothy Kokoel	106 Hospital Drive Suite 105	South Williamson	KY	41503	$1,000.00		
8/17/04	Agel Zandle	101 Mount Tabor Road	Beckley	WV	25801	$1,000.00		
8/17/04	JoAnn Yates	236 Rock House Road	Lester	WV	25165	$1,000.00		
8/17/04	Jane L. Price	102 College Avenue	Beckley	WV	25801	$1,000.00		
8/17/04	Donna Zandle	106 Riverview Lane	Beckley	WV	25801	$1,000.00		
8/17/04	Judith A. Smith	1814 Maxwell Hill Road	Beckley	WV	25801	$1,000.00	Executive	Raleigh Mine
8/17/04	Catherine Toney	711 Worley Road	Beckley	WV	25801	$1,000.00		
8/17/04	S. S. Smith	Post Office Box 72	Mount Hope	WV	25880	$1,000.00	Executive	Pikeville Legal
8/17/04	Timothy W. Rader	1299 Rose Road	Mount Nebo	WV	26679	$1,000.00		
8/17/04	Marshall White	1041 Jones Avenue	Oak Hill	WV	25901	$1,000.00		
8/18/04	Ann Bentley	615 Holly Road	Charleston	WV	25314	$500.00		
8/18/04	Kimberly S. Jones	22 Coventry Road	South Charleston	WV	25309	$1,000.00		
8/18/04	Martha Lee Kelley	1203 Hospital Drive, Suite 1203	Hamlin	WV	25520	$1,000.00	Physician	Self
8/18/04	Michael Benevento	12100 Mercer Court	Glen Allen	VA	23059	$750.00	Manager	Mooney Energy Company
8/18/04	Aaron R. Sims, Jr.	Post Office Box 670	Holden	WV	25625	$2,000.00	Owner	Holden Machine
8/18/04	George Blankenship	129 W. Second Avenue	Williamson	WV	25661	$1,000.00	CPA	Self
8/18/04	James Rice	Post Office Box 562	Ventureville	WV	25649	$2,000.00		
8/18/04	Gerald Wedemeyer	811 Lawrence Avenue	Bridgeport	WV	26330	$500.00		
8/18/04	Sally Q. Nelson	5120 Grapevine Way	Birmingham	AL	35242	$1,000.00		
8/18/04	Pendale A. Collins	46 Point Drive	Petersburg	WV	26847	$500.00	Homemaker	

Blank Occupation in Process
See Attached Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

5/1/06	William H. Hudnut, III	120 Eaton Creek Pkwy Suite 2000	Birmingham	AL	35242	$1,000.00	Executive	Hudnut Partners, Inc.
5/1/06	Michael Hinkle	213 Chapman Road	Carmel	WV	26032	$2,000.00	Owner	H&H Welding Company, Inc.
5/1/06	Jeffrey M. Giltinanier	214 Troy Post Road	South Charleston	WV	25309	$1,000.00	Director of Edward Allen	Massey Coal Services
5/2/06	James H. Wallen	408 Meade Street, Suite 101	Charleston	WV	25301	$1,000.00	Physician	Self
5/3/06	Michael S. Harvey	302 Forestbrook Drive	Hurricane	WV	25526	$1,000.00	Corporate Counsel	Massey Energy
5/3/06	Sharon L. Phillips	14210 Whitfield Drive	Richmond	VA	23233	$1,000.00	Housewife	
5/3/06	Perry H. Edmondson, Jr.	Post Office Box 3002	Vinton	WV	24179	$1,000.00		
5/3/06	Joseph S. Cook	317 Southpointe Drive	Charleston	WV	25314	$1,000.00	Retired	
5/3/06	Greg Duffy	Box 968	Beckley	WV	25802	$500.00	President	Little General Stores
5/3/06	Scott Reeves	1 Red Knoll Knoll	Bethlehem	WV	26030	$1,000.00	PAC	
5/3/06	Larry Addington	2744 J-Lynn Lane	Cedarsburg	KY	41129	$1,000.00		
5/3/06	Robert Addington	1337 Sheffield Place	Lexington	KY	40509	$1,000.00		
5/3/06	A. Ryan Addington	4423 Bryn Station Road	Lexington	WV	40514	$1,000.00	Mining Company Executive	Self
5/3/06	Myra Dunn	Post Office Box 164	Verner	WV	25992	$1,000.00	Owner	A.M. Trucking
5/3/06	Gwendolyn J. Woodson	Post Office Box 101	Sylvester	WV	25193	$250.00	Owner	Woodson's General Merchandise
5/3/06	Nancy G. Glenn	1256 Maimo Drive	Lexington	KY	40513	$1,000.00		
5/3/06	Lawson S. Kenton	429 Timothy Branch	Pineville	KY	40977	$500.00	Assistant Director	Massey Coal Services
5/3/06	James D. Connelly	Post Office Box 1720	Princeton	WV	24740	$500.00	President	Coon-Wald Industries
5/3/06	D. Reding Hall	Post Office Box 1175	Huntington	WV	25717	$500.00	Chairman of Board	Huntington Steel & Supply
5/3/06	Greg Nolen	13260 Quail Ridge	Aldie	VA	20105	$1,000.00		
5/3/06	Dorsey Quinn	Post Office Box 611	Malden	WV	25425	$1,000.00	CEO	National Aggregate
5/3/06	Mark A. Clowney	9 Raleigh Place	Green Lane	WV	25313	$1,000.00	Accountant	Massey Energy
5/3/06	Tom C. Clarke	720 Old Dobbin Cir	Lexington	KY	40502	$1,000.00		
5/3/06	William Maynard	Post Office Box O	Malden	WV	25425	$1,000.00	Owner	Maynard's Machine Hydraulics, Inc.
5/3/06	Janet C. Clarke	720 Old Dobbin Circle	Lexington	KY	40502	$1,000.00		
5/3/06	Raymond Bradbury	4736 Fieldcrest Boulevard	Lexington	KY	40513	$1,000.00	Retired	
5/3/06	Howard B. Hartley	Post Office Box 1468	Kingwood	WV	26537	$400.00	Hartley Insurance Agency	Self
5/3/06	Kenneth E. Alexander	145 Bristol Run Road	Bristol	VA	24202	$1,000.00	Owner	The Alexander Group
5/3/06	Lisa Alexander	145 Bristol Run Road	Bristol	VA	24202	$1,000.00	Owner	The Alexander Group
5/3/06	Chris Cline	450 Hagan Park Drive	Beckley	WV	25801	$1,000.00	President	Cline Resources & Development
5/3/06	J. Kevin Alexander	145 Bristol Run Road	Bristol	VA	24202	$1,000.00	Owner	The Alexander Group
5/3/06	Chris Morgan	2223 Fieldfield Avenue	Rhodell	WV	25915	$500.00		
5/3/06	William A. Sheldon, III	174 E. Main Street	Lexington	KY	40507	$500.00		
5/3/06	Arnold G. Stovall	49 Beaver Beach Road	Morgantown	WV	26508	$1,000.00		
5/3/06	Arnold Dodrill	Route 1, Box 180	Williamson	WV	25661	$1,000.00		
5/3/06	Kenneth H. Fox	539 Northwestern Avenue	Beckley	WV	25801	$1,000.00		
5/3/06	Anna U. Jones	503 Clay Circle	Danville	WV	25053	$1,000.00		
5/3/06	Raymond L. Collins	Rural Route 3, Box 478	Shinnston	PA	15874	$1,000.00		

Bank Designation In Process
See Attached Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

8/30/04	Prakash Parmiti	302 Timber Ridge Road	Berkley	WV	25801	$1,000.00	Physician	Self
8/30/04	Thomas P. Dougherty, Jr.	Post Office Box 26765	Richmond	VA	23261	$1,000.00	Vice President	Massey Utility Sales Co.
8/30/04	Thomas A. Wasson	Route 1, Box 353	Clarksburg	WV	26301	$500.00	Homewife	
8/30/04	William F. Stafford	HC 71, Box 6	Princeton	WV	24740	$500.00		
8/30/04	Ann G. Stafford	401 Gunnison Lane	Princeton	WV	24740	$500.00		
8/30/04	Earl G. Whyde	508 Delaney Drive	Charleston	WV	25314	$1,000.00		
8/30/04	Helen S. Miller	1300 Mount Vernon Place	Charleston	WV	25314	$1,000.00		
8/30/04	Philip Mauck	510 Woodbridge Drive	Charleston	WV	25311	$500.00		
8/30/04	Bruce Johnson	643 Forest Hills Road	Forest Hills	KY	41527	$700.00	Homewife	
8/30/04	BAG Associates	420 S North Weber Road 8333	Bensenville	IL	60446	$500.00	PAC	
8/30/04	Randy D. Blanchard	327 Flat Top Lake Road	Gilbert	WV	25843	$1,000.00	President	Riverton
8/31/04	WVEMPAC	Post Office Box 187	Bensenville	WV	26538	$1,000.00	PAC	
8/31/04	Jackson Lindsey	710 Overlook Drive	Berkley	WV	25801	$1,000.00	Physician	Self
8/31/04	Mathewson Happenstal	1331 Southview Drive Suite 13	Blacksfield	WV	24701	$1,000.00	Physician	Self
8/31/04	Catherine T. McKinney	11 Chesterwith Drive 68	Bridgeport	WV	26330	$1,000.00	Homewife	
8/31/04	Michael Fisher	1361 Clark Road	Charleston	WV	25314	$1,000.00	Physician	Bone & Joint Surgeons
8/31/04	Woody Dowd	22 W. Bowling Lane	Berkley	WV	25801	$2,000.00		
8/31/04	James L. Hurley	1206 Gates's Branch	Gladstone	KY	41562	$2,000.00		
8/31/04	Eddie Hurley	10003 Highway 194E	Phelps	KY	41515	$2,000.00		
8/31/04	Shirley L. Whitaker	35 Fairview Heights	Parkersburg	WV	26101	$1,000.00		
8/1/04	Michael A. Kelly	One Pavilion Drive	Daniels	WV	25823	$1,000.00	Physician	Self
8/1/04	Sarah C. Wade	3 Orchard Lane	Point Pleasant	WV	25550	$1,000.00	Homemaker	
8/1/04	Douglas B. Sanderson	Route 1, Box 215A	Danville	WV	25053	$1,000.00	Dir. Underground Mining	Massey Coal Services
8/1/04	Sybil F. Mallie	5215 Pioneer Drive	Green Lane	WV	25313	$500.00	Homewife	
8/1/04	Richard M. Adams	52 Mandewood Drive	Parkersburg	WV	26101	$1,000.00	Banker	United Bank
8/1/04	James M. McCandlum	Post Office Box 4268	Parkersburg	WV	26104	$1,000.00	Retired	
8/2/04	Vergie E. Howard	Box 50	Chattaroy	WV	25667	$1,000.00		
8/2/04	Jack Sykes	373 Winston St.	Pikeville	KY	41501	$1,000.00		
8/2/04	Phillip Lucas	83 Stuart Drive	Pikeville	KY	41501	$1,000.00		
8/2/04	Jeremy D. Howard	Post Office Box 331	Chattaroy	WV	25667	$1,000.00		
8/2/04	John D. Howard	Route 1, Box 170	Williamson	WV	25661	$1,000.00		
8/2/04	Lori D. Hartley	Rural Route 1, Box 150	Valley Grove	WV	26060	$500.00	Physician	Emergency Physicians of Ohio County
8/2/04	Joseph R. Howard	Route 1, Box 226A	Williamson	WV	25661	$1,000.00		
8/2/04	David Sanders	314 Northcrest Woods	Pikeville	KY	41501	$1,000.00		
8/2/04	Lonnie Mahon	Post Office Box 273	Chattaroy	WV	25667	$1,000.00	Homewife	
8/2/04	C. Michael Allen	12000 Dykeland Road	Apple Courthouse	VA	23002	$1,000.00	President	Massey Metallurgical
8/2/04	Randy Howard	1870 Fall Link Road	Oak Orchard	KY	40410	$1,000.00		
8/2/04	John Kostich	1440 Lakewood Drive	Lexington	KY	40502	$1,000.00		
8/2/04	Rocky L. Gardner	2953 Little Dog Gap Lane	Louisville	TN	37777	$1,000.00	Homewife	

Blank Occupation in Process
See Attached Letter

Contributions Over $250.00
Benjamin for Supreme Court Committee

9/2/04	Darrell E. Powell, Jr.	713 Rouse Drive	Sandston	VA	23150	$750.00	CIO	Massey Energy
9/2/04	James H. Hudson	Post Office Box 1210	Gilbert	WV	25621	$1,000.00	Owner	International Industries
9/2/04	John R. Parker	218 Jodie Terrace	Richmond	VA	23236	$1,000.00	SVP	Massey Utility Sales
9/2/04	Steve E. Sears	7901 Reichenwood Road	Chesterfield	VA	23832	$1,000.00	President	Massey Industrial Sales
9/2/04	Thomas J. Kinley	11800 Westmont Drive	Richmond	VA	23236	$1,000.00	Vice President	Massey Traffic
9/2/04	David Kamish	419 Summit Drive	Pikeville	KY	41501	$1,000.00		
9/2/04	Larry G. Mounts	Route 2, Box 150	Fort Gay	WV	25514	$500.00	Superintendent	Mania County Coal
9/2/04	Eric B. Tolbert	15631 Brandyoaks Drive	Chesterfield	VA	23832	$500.00		
9/2/04	Jerry Hulda	Post Office Box 95	Williamson	WV	25661	$1,000.00	Manager	Independence Coal Company
9/2/04	John S. Mink	141 Whispering Woods	Charleston	WV	25304	$500.00		
9/2/04	Thomas Cochran	120 Daniel Street	Berkley	WV	25801	$500.00	Assessment	Phillips Equipment
9/2/04	Robert A. Johnston	1550 Mt. Alpha Road	Charleston	WV	25304	$1,000.00		
9/2/04	Andrew B. Jordan	One Norwood Road	Charleston	WV	25314	$1,000.00	Coal Operator	Richards Mining
						$ 251,900.00		

Bank Occupation in Process
Bus Attached Letter

«Prefix» «FirstName» «MiddleName» «LastName» «Suffix»
«OrganizationName»
«Address»
«City», «State» «Postal_Code»

Dear «Prefix» «LastName»:

Thank for your contribution to the Brent Benjamin for Supreme Court Campaign. Your contribution to the campaign makes it possible to begin purchasing our commercial spots for this fall. Now that the primary is over, the race is heating up and we have an even greater amount of work to be done.

Your support and financial help are greatly appreciated. I know how hard people work for their money and because of that we will spend your money as wisely as we would spend our own.

State Campaign Finance Law requires that we list the occupation and employer for contributions over $250. Would you please fill out the enclosed contribution card and return it by August 31, 2004, in the enclosed self-addressed, stamped envelope?

You have given the campaign a great boost. Together, we can elect a judge who will return equal justice and fairness to our Supreme Court.

Sincerely,

Rob Capehart
Campaign Manager

RCC:ncg

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 08-26-04 **Type of Event** Reception

Name of Place Held Columbia Gas Transmission

Address of Place Held 1700 MacCorkle Avenue, Charleston, WV 25314

Total Receipts $75,620.00 **Total Expenditures** $1617.61

NET RECEIPTS (Subtract total expenditures from total receipts) $74,002.39

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees.* ***(For additional information, see General Instructions, Page 4.)***

$250.00 OR LESS

Date	Full Name	Amount
	See Attached Lists	

Schedule 2A - Fund Raisers
Benjamin for Supreme Court Committee

8/24/04	Karen	L.	Bowling		$250.00	Charleston
8/17/04	Allan	E.	Fowler		$200.00	Charleston
8/27/04	Bonnie		Harold		$250.00	Charleston
8/16/04	Marc	A.	Sprouse		$100.00	Charleston
8/23/04	J.	Thomas	Lane		$250.00	Charleston
8/24/04	Paul	J.	Bosserr	Jr.	$250.00	Charleston
8/25/04	Janis		Peacock		$20.00	Charleston
8/28/04	Andrew		Teter		$250.00	Charleston
8/28/04	Thomas	P.	Taylor		$100.00	Charleston
8/28/04	Stevenson	L.	Pugh		$100.00	Charleston
8/27/04	Robert	E.	Lennan		$250.00	Charleston
8/27/04	Karen		Price		$250.00	Charleston
8/27/04	Michael		Kawash		$250.00	Charleston
8/27/04	Jerry		Nelson		$100.00	Charleston
8/27/04	Amy		Clendenin		$250.00	Charleston
8/27/04	John	R.	Snider		$250.00	Charleston
8/27/04	Bill		Flaherty		$200.00	Charleston
8/27/04	Larry	D.	Emerson		$150.00	Charleston
8/27/04	Robert	D.	Whitler		$200.00	Charleston
8/27/04	James	M.	Mullins		$250.00	Charleston
8/27/04	David	E.	Runyon		$100.00	Charleston
8/27/04	Glenn		Crotty	Jr.	$200.00	Charleston
8/27/04	Larry		Hudson		$200.00	Charleston
8/27/04	Clifton		Frye		$250.00	Charleston
8/27/04	John	J.	McDaniel		$200.00	Charleston
8/27/04	Marlene		Barnes		$250.00	Charleston
8/27/04	Paul	Clinton	Winter		$250.00	Charleston
8/27/04	G.	F.	Wooten		$100.00	Charleston
8/27/04	Patrick	D.	Kelly		$200.00	Charleston
8/27/04	Bradley		Crouser		$250.00	Charleston
8/27/04	Lucinda	L.	Flaherty		$200.00	Charleston
8/27/04	Michael	P.	Zirkle		$100.00	Charleston
8/27/04	Dennis	J.	Whittlesey		$100.00	Charleston
8/27/04	Robert	F.	Duncan		$250.00	Charleston
8/27/04	Erin	E.	Magee		$250.00	Charleston
8/27/04	Gale	Reddis	Lee		$250.00	Charleston
8/27/04	Stephen	R.	Crislip		$250.00	Charleston
8/27/04	Roger	L.	Nicholson		$250.00	Charleston
8/27/04	Ronald	E.	LaNeve		$100.00	Charleston
8/27/04	Deetra	E.	Adkins		$50.00	Charleston
8/27/04	Fred		Williams		$100.00	Charleston
8/27/04	David	E.	Runyon		$100.00	Charleston
8/27/04	James	M.	Mullins		$250.00	Charleston
8/27/04	David	P.	Ferrell		$200.00	Charleston
8/27/04	Michael	T.	Jarrell		$100.00	Charleston
8/27/04	John	J.	McDaniel		$150.00	Charleston
8/27/04	John	C.	Palmer	IV	$350.00	Charleston
8/27/04	Kent	R.	DesRocher		$100.00	Charleston
8/27/04	William	B.	Ramey		$250.00	Charleston
8/30/04	Oren	Eugene	Kitts		$250.00	Charleston
8/30/04	Robert	L.	Morris		$100.00	Charleston

Schedule 2A - Fund Raisers
Benjamin for Supreme Court Committee

8/31/04	Frederick	T.	Sporck		$200.00	Charleston
8/27/04	Connie	W.	Long		$100.00	Charleston
8/27/04	Mark	A.	Robinson		$50.00	Charleston
8/27/04	Dawna	C.	Ledbetter		$250.00	Charleston
9/2/04	Thomas	S.	Liberatore		$100.00	Charleston
9/2/04	Steven	J.	Summer		$250.00	Charleston
					$10,520.00	

Schedule 2A Fund-Raising Events
Benjamin for Supreme Court Committee

6/13/04	W. M. Beeler	48 Ledgend Road	West Hartford	CT	6117	1,000.00	Citizens	West Virginia Media
6/28/04	Lisa G. Cordish	28 Cottage Road	Charleston	WV	25314	1,000.00	Agent	Ben Team
6/27/04	L. Steven Thomas	704 Hansen Road	Charleston	WV	25314	500.00	Retired	
6/27/04	Thomas J. Dorsey	315 75th Street	Charleston	WV	25304	1,000.00	Circuit Council	Massey Energy
6/27/04	Douglas C. Middleton	1709 Bradford Road	Charleston	WV	25314	1,000.00	Attorney	Robinson & McElwee
6/28/04	M. Speckled Bird	3547 Parkwood Road	Charleston	WV	25314	1,000.00	Citizen	Amarillo Brighwyn Burton
6/28/04	Joann M. Wallace	400 Kanawha Street, Suite 101	Charleston	WV	25301	1,000.00	Physician	SMT
6/23/04	Greg Dotts	Box 610	Huddy	WV	25938	500.00	President	Title Insurer Issue
6/23/04	Sue D. Bellamy	Post Office Box 949	Mullens	WV	25133	1,000.00	Physician	SMT
6/27/04	Gary Nelson	1849 Kanawha Road, 47th	Charleston	WV	25314	500.00	Trade Association Executive	PSA
6/23/04	WV Motor Truck Association	Post Office Box 7187	Charleston	WV	25356	500.00	PAC	
6/23/04	Andrew G. Marcus	2748 N. Tazewell Street	Arlington	VA	22207	1,000.00	Lawyer	Shaw Stocks
6/27/04	Citizens Oil Co.	139 South Main Street	Shelby	OH	44875	1,000.00	PAC	
6/27/04	Steve Day	10 Tetney Woods Road	Charleston	WV	25314	500.00	Trustee Work	President
6/27/04	Richard D. Peters	1305 Thomas Circle	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
6/27/04	Jan Middleton	1018 Tyler Road	Charleston	WV	25314	1,000.00	Plant Manager	Phelps
6/27/04	Dodd Kenney	20 Watson Road	Charleston	WV	25314	500.00	Management	CABEC
6/27/04	Cindy Dobbins	Post Office Box 3021	Charleston	WV	25331	500.00	Operations Director	WVCHCA
6/27/04	Faye Jim	1909 Peatwich Drive	Cross Lanes	WV	25313	500.00	Insurance Agent	Self
6/27/04	Ralph Ballard	402 Quarry Point	Charleston	WV	25304	1,000.00	Engineer	ARES, Inc.
6/27/04	Debbie Ballard	402 Quarry Point	Charleston	WV	25304	1,000.00	Housewife	
6/27/04	Michael B. Carney	1334 Upper Ridgeway Road	Charleston	WV	25304	1,000.00	Retired	Ore Ship
6/27/04	Jason S. Barker	2933 Little Dog Highway	Louisville	KY	40217	1,000.00	Operations	Massey Energy
6/27/04	Pension	Post Office Box 371	New Martinsville	WV	26155	1,000.00	PAC	PPG Industries
6/27/04	Dorothy M. Miller	701 Laurel Road	Charleston	WV	25314	500.00	Attorney	Robinson McElwee
6/27/04	Franklin Lawyers	442 West Main Street	Clarksburg	WV	26301	500.00	PAC	
6/27/04	Richard S. Wilson	1330 Kanawha Boulevard E. 6101	Charleston	WV	25301	500.00	Executive VP	Walter Machinery
6/27/04	Pamela E. Canfield	33 Quail Pointe Drive	Charleston	WV	25302	1,000.00	Manager	Arch Coal, Inc.
6/27/04	Amy Ballard	2341 Pennfield Drive	Charleston	WV	25314	2,000.00	Owner/Housewife	Jim Ballard Chevrolet
6/27/04	Parrish C. Gray	1 Quarry Ridge	Charleston	WV	25304	1,000.00	Retiree	Precision Products, Inc.
6/27/04	Columbia Employees	200 Civic Center Drive	Columbus	OH	43215	1,000.00	PAC	
6/27/04	A.L. Emch	1514 Kelley Mills Road	Charleston	WV	25314	1,000.00	Attorney	Jackson Kelly
6/27/04	John E. McCleskey	911 Second Square SE	Washington	DC	20003	1,000.00	Attorney	Jackson Kelly
6/27/04	Robert J. Bunn	1400 Olympic Road	Charleston	WV	25314	1,000.00	Attorney	Jackson Kelly
6/27/04	Stephen D. Young	200 Lakeside Drive, W.	Canonsburg	PA	15317	1,000.00	Management	Consol
6/27/04	Jason S. Snyder	1913 Woodside Road	Charleston	WV	25314	1,000.00	Attorney	Jackson Kelly

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Blank Designation in Parentheses
Box Appointed Letter

1 of 3

Schedule 2A Fund-Raising Events
Benjamin for Supreme Court Committee

8/27/04	Robert G. Mulinsky	1074 Lauden Heights Road	Charleston	WV	25314	1,000.00	Attorney	Jackson Kelly
8/27/04	Brenda E. Lilly	9091 Sherwood Court	Pearce	PA	15143	1,000.00	Homemaker	
8/27/04	Peter R. Lilly	1800 Washington Road	Pittsburgh	PA	15241	1,000.00	Management	Coastal
8/27/04	William J. Lyons	3260 Washington Pike	Bridgeville	PA	15017	1,000.00		
8/27/04	Ronald E. Smith	141 Bond Drive	Middletown	PA	15377	1,000.00	Executive Vice President	Coastal Energy
8/27/04	William F. Dobbs	Post Office Box 553	Charleston	WV	25322	1,000.00	Attorney	Jackson Kelly
8/27/04	J. Scott Sherry	1680 Washington Road	Pittsburgh	PA	15241	2,000.00		Coastal
8/27/04	West Virginia Coastal	1680 Washington Road	Pittsburgh	PA	15241	1,000.00	PAC	
8/27/04	Dennis C. Sauter	3 Meadow Road	Charleston	WV	25314	1,000.00	Attorney	Jackson Kelly
8/27/04	Bruce W. Thomas	18 Saint Andrews Drive	Hurricane	WV	25526	1,000.00	Attorney	Jackson Kelly
8/27/04	Benjamin Westerman	2300 Charles Avenue	Dunbar	WV	25064	1,000.00		
8/27/04	Lynn Oliver Pryor	101 Thomas Way	Martinsburg	WV	25401	1,000.00	Attorney	Jackson Kelly
8/27/04	J. Thomas Davis	1291 Johnson Road	Charleston	WV	25314	1,000.00	Investment	Merrill Lynch
8/27/04	Lawrence A. Peck	2147 Presidential Drive	Charleston	WV	25314	1,000.00	CPA	Peck Hawley
8/27/04	Mark Hogan	120 Walnut Street	St. Albans	WV	25177	1,000.00	Agent	State Farm
8/27/04	Thomas Stalnaker	1339 Chelsea Road	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
8/27/04	Timothy Stallman	718 Myrtle Road	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
8/27/04	Louis S. Southworth	Post Office Box 553	Charleston	WV	25322	500.00	Attorney	Jackson Kelly
8/27/04	Thad S. Stallman	401 Halford Lane, Apt. 614	Alexandria	VA	25314	500.00	Attorney	Jackson Kelly
8/27/04	Charles Decker	5314 Ashbrook Drive	Green Lane	WV	25315	500.00	Attorney	Jackson Kelly
8/27/04	Gary W. Shea	1723 Sharp Road	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
8/27/04	Charles M. Barber	320 Woodbridge Drive	Charleston	WV	25311	500.00	Attorney	Jackson Kelly
8/27/04	L. Anthony George	1134 Sunnyberry Drive	Golden	CO	80401	500.00	Attorney	Jackson Kelly
8/27/04	James Eric Whytsell	Post Office Box 618	McKenny	MD	21631	500.00	Attorney	Jackson Kelly
8/27/04	Mike A. Miller	1400 Oakmont Road	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
8/27/04	A. Stuart Bennett	1304 Gentlemen Lane	Versailles	KY	40383	500.00	Attorney	Jackson Kelly
8/27/04	Michael A. Albert	843 Spring Road	Charleston	WV	25314	500.00	Attorney	Jackson Kelly
8/27/04	G-P Employees Fund	1120 G Street NW, Suite 1050	Washington	DC	20005	500.00	PAC	
8/27/04	WV Mates Cardoso	Post Office Box 5187	Charleston	WV	25361	500.00	PAC	
8/27/04	Coca-Cola Consolidated	Post Office Box 31487	Charlotte	NC	28231	500.00	PAC	
8/27/04	Charles R. Ryan	102 Abney Circle	Charleston	WV	25314	500.00	Owner	Charles Ryan Associates
8/27/04	Mark Dempsey	Post Office Box 1420	Ashland	KY	41105	500.00	Representative	American Electric Power
8/27/04	T. Randolph Cox	623 Shelly Road	Charleston	WV	25314	500.00	Attorney	Spillman Bowie
8/27/04	Henry S. Tuckin	1340 Valentine Circle	Niles	WV	25143	500.00	Owner	Tuckin Management Group
8/27/04	John B. Skidmore	3 Chrysanet Road	Charleston	WV	25304	500.00	Owner	Skidmore Associates
8/27/04	Timothy W. Miller	701 Laurel Road	Charleston	WV	25314	500.00		
8/27/04	R. Austin Wallace	620 Middle Road	Charleston	WV	25314	500.00	Physician	Self

Blank Occupation in Process
See Attached Letter

Schedule 2A Fund-Raising Events
Benjamin for Supreme Court Committee

9/7/94	P. Ryan Bond	110 Whitewood Drive	Wheeling	WV	2,501	$40.00	Governmental Affairs	Appellate Practice Group
9/7/94	E. Leslie Wallace	4303 S Hills Street	Arlington	VA	22206	$75.00	Attorney	Andrews Kelly
9/7/94	Barbara Leith	3100 Bayou Point Boulevard	Pensacola	FL	32561	$30.00		
9/7/94	Charles J. Condo	600 Shagbark Circle	Morgantown	WV	26505	$50.00	Attorney	Andrews Kelly
9/9/94	Kelly Arnold	510 Woodridge Lane	Charleston	WV	25311	$50.00		
9/9/94	Mike E. Miller	1304 Mount Vernon Place	Charleston	WV	25314	$1,000.00		
9/9/94	Carl G. Wayne	900 Delawy Drive	Charleston	WV	25314	$1,000.00		
9/9/94	Edward M. Adams	12 Meadowood Drive	Parkersburg	WV	26101	$1,000.00	Banker	United Bank
9/7/94	Elizabeth G. Lord	1,202 Hazelbrook Way	Charleston	WV	25314	$50.00	Attorney	Andrews Kelly
9/7/94	Pamela Dana Tritt	1721 Bass Road	Charleston	WV	25314	$50.00	Attorney	Andrews Kelly
9/7/94	Larry W. Blalock	116 Arbor Way	Wheeling	WV	26003	$50.00	Attorney	Andrews Kelly
9/7/94	Mary Ann Baron Cecco	33 NW Sea Mill	Salem	WV	26426	$50.00	Attorney	Andrews Kelly

$ 63,185.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 9-3-04 Type of Event Breakfast

Name of Place Held The Greenbrier

Address of Place Held White Sulphur Springs, WV 24986

Total Receipts $5,800 Total Expenditures Not yet received

NET RECEIPTS (Subtract total expenditures from total receipts)

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5e requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees.* ***(For additional information, see General Instructions, Page 4.)***

$250.00 OR LESS

Date	Full Name	Amount
	See Attached Lists	

Schedule 2A - Fund Raisers
Benjamin for Supreme Court Committee

9/3/04	John	R.	Cheatham		$ 250.00	Business Summit
9/3/04	Martha	H.	Slater		$ 50.00	Business Summit
					$ 300.00	

Schedule 2D - Fund Raisers
Benjamin for Supreme Court Committee

[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	PAC	
[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	VP and CFO	WV Chamber of Commerce
[redacted]	[redacted]	[redacted]	[redacted]	WV	[redacted]	[redacted]	PAC	
						$3,300.00		

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SCHEDULE 3A

OTHER INCOME: INTEREST, REFUNDS, MISCELLANEOUS RECEIPTS

(For information, see General Instructions, Page 4.)

Date	Source of Income	Type of Receipt	Amount
		(Enter Total on Page 1, line 4) Total	0

SCHEDULE 4A

IN-KIND CONTRIBUTIONS

(For information, see General Instructions, Page 4.)

Date	Full name, address, occupation and place where works (if total contributions by individual or committee are more than $250.00)	Description of contribution	Value (amount)
		(Enter Total on Page 1, line 7) Total	0

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SCHEDULE 1B

LOANS

West Virginia Code: §3-8-5f. Loans to candidates, organizations or persons for election purposes.

"Every candidate, financial agent, person or association of persons or organization advocating or opposing the nomination or election of any candidate or the passage or defeat of any issue or item to be voted upon may not receive any money or any other thing of value toward election expenses except from the candidate, his or her spouse or a lending institution. All loans shall be evidenced by a written agreement executed by the lender, whether the candidate, his or her spouse, or the lending institution. Such agreement shall state the date and amount of the loan, the terms, including interest and repayment schedule, and a description of the collateral, if any, and the full names and addresses of all parties to the agreement. A copy of the agreement shall be filed with the financial statement next required after the loan is executed."

The loan agreement must include all items asked for in the statute. (See above.) The loan agreement does not have to follow a certain format; generally, if all the required information is listed, any format is acceptable.

Candidates or political committees that take out a loan for the campaign through a bank or other commercial lending institution must include a copy of the loan agreement executed with that bank or institution. Candidates should not take out loans which are partially for personal use and partially for the campaign. It is almost impossible to keep reporting straight in this case.

Any money a candidate contributes to his or her campaign committee with the hope of repayment must be treated as a loan and reported in this section. When a candidate determines that no further repayment can be expected, the loan can be reported as repaid in this section by entering the amount left to repay in the repayments column and reporting the same amount as a contribution from the candidate in Schedule 1A. **These loans must be executed in writing. Caution: Candidates may not carry outstanding loans from one campaign to the next. Each campaign is separate. Funds from a current campaign cannot be used to repay a loan from a previous campaign.**

How to report loans

1. Each loan for your campaign should be listed on a separate line. (Each time you loan money to the campaign or get a loan, it is a considered to be a separate loan.) Include the following information on the form below:
   a. loan(s) from prior reporting periods and the balance of each loan (Col. A.) If a payment was made on the loan, list that in Col. C. Any loan that was repaid in previous reporting periods does not have to be listed.
   b. new loans, the amount (Col. B), any repayments (Col. C), and the balance (Col. D.)
2. Add the amounts of all new loans (Col. B total) and carry that number to the Report Summary, Page 1, Col. A, line 5.
3. Add the amounts of all repayments (Col. C total) and carry the total to the Report Summary, Page 1, Col. A, line 9.
4. Add amounts of outstanding loans (Col. D total) ,and carry the total to the Report Summary, Page 1, Col. A, line 16.
5. Attach a copy of the loan agreement for each loan received during the reporting period.

SCHEDULE 1B

LOANS

(A copy of the loan agreement for each loan secured during this filing period must accompany this report)

Bank Loans: List name & address of financial institution Candidate or Candidate's Spouse Loans: List name, residence and mailing address of person(s) making or cosigning loan	Column A Balance of previous loan at end of period Amount	Column B Amount of new loan received during period Date	Amount	Column C Repayments during period Date	Amount	Column D Balance outstanding at end of period Amount
1. Brent Benjamin 1807 Huber Road Charleston, WV 25314	$16,250.00					$16,250.00
2.						
3.						
4.						
5.						
(Enter Totals on Report Summary, Page 1.) Totals						$16,250.00

SCHEDULE 28 **ITEMIZED EXPENDITURES**

(For information on Expenditures, see General Instructions, Page 5.)

Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount expenditure
	See Attached Listing		

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(Enter Total on Page 1 line 4) Total

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

Date	Full name, residence address (if a person) or business address (if a business)	Purpose	Amount Expenditure
4/26/04	Key Strategies, 16 Brookline Drive, Charles Town, WV 25414	Consulting Fee	$ 2,000.00
6/7/04	PHR Consulting Group LLC, 100 E. Broad Street, Suite 2330, Columbus, OH 43215	Media Consultant	$ 3,000.00
6/9/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Consulting Fee	$ 1,000.00
6/9/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Consulting Fee	$ 1,000.00
6/14/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Consulting Fee	$ 750.00
6/14/04	BB&T, Summers Street, Charleston, WV 25301	Service Fee	$ 5.95
6/18/02	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Consulting Fee	$ 750.00
6/21/04	BB&T, Summers Street, Charleston, WV 25301	Service Charge	$ 22.50
6/30/04	B. Stanley Gill, 1119 Jefferson Road, South Charleston, WV 25309	Furniture Rental	$ 90.00
6/30/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consulting F	$ 3,000.00
6/30/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Consulting Fee	$ 1,580.00
7/2/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Consulting Fee	$ 1,560.00
7/5/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consulting F	$ 2,000.00
7/7/04	BB&T, Summers Street, Charleston, WV 25301	Check Charge	$ 43.12
7/8/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Travel Expenses	$ 158.47
7/8/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Travel Expenses	$ 498.58
7/8/04	City of Charleston P O. Box 2749 Charleston, WV 25330	Parking	$ 40.00
7/13/04	City of Charleston P O. Box 2749 Charleston, WV 25330	Parking	$ 40.00
7/13/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Office Supplies	$ 377.12
7/14/04	BB&T, Summers Street, Charleston, WV 25301	Service Fee	$ 5.95
7/15/04	Embassy Suites 300 Court Street Charleston, WV 25301	Meeting Room	$ 210.83
7/15/04	United States Postmaster, Lee Street, Charleston, WV 25301	Stamps	$ 37.00
7/15/04	Brent Benjamin, 1807 Huber Road, Charleston, WV 25314	Repayment of Loan	$ 2,000.00
7/20/04	City of Charleston P.O. Box 2749 Charleston, WV 25330	Parking	$ 70.00
7/21/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Computer Equipment	$ 1,000.00
7/28/04	BrabenderCox 100 West Station Square Drive Pittsburgh, PA 15219	Media Consultant	$ 2,250.00
7/28/04	The Mailroom, 3959 Teays Valley Road Hurricane, WV 25526	Contribution Cards	$ 143.10
7/28/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Contract Labor	$ 3,936.00

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

7/29/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Contract Labor	$	3,320.00
7/29/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	3,000.00
7/28/04	Jason Wanbaugh, 38 W 7th Avenue, Apt. 7, Huntington, WV 25701	Contract Labor	$	600.00
7/29/04	Andrew Bernstein	Contract Labor	$	600.00
8/2/04	Key Strategies, 18 Brookline Drive, Charles Town, WV 25414	Campaign Consultant	$	500.00
8/2/04	City of Charleston P.O. Box 2749 Charleston, WV 25330	Parking	$	120.00
8/2/04	BMT, Summers Street, Charleston, WV 25301	Stop Payment	$	32.00
8/3/04	BrabenderCox 100 West Station Square Drive Pittsburgh, PA 15219	Campaign Brochures	$	3,691.00
8/3/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	4,000.00
8/3/04	BrabenderCox 100 West Station Square Drive Pittsburgh, PA 15219	Tax on Brochures	$	115.60
8/4/04	United States Postmaster, Lee Street, Charleston, WV 25301	Postage	$	111.00
8/9/04	Connie Machal, 149 Timberlake Circle, Scott Depot, WV 25560	Contract Labor	$	1,750.00
8/11/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	3,600.00
8/12/04	United States Postmaster, Lee Street, Charleston, WV 25301	Stamps	$	74.00
8/13/04	United States Postmaster, Lee Street, Charleston, WV 25301	Stamps	$	74.00
8/13/04	Connie Machal, 149 Timberlake Circle, Scott Depot, WV 25560	Expenses	$	244.68
8/13/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Expenses	$	517.35
8/13/04	Jason Wanbaugh, 38 W 7th Avenue, Apt. 7, Huntington, WV 25701	Expenses	$	281.29
8/13/04	Jeremy Maynard, 373 A. Street, Ceredo, WV 25507	Expenses	$	688.10
8/13/04	Steve Cohen, 155 Elm Street, #2, Wheeling, WV 26003	Contract Labor	$	4,600.00
8/13/04	Votes Unlimited, P.O. Box 188, Ferndale, NY 12734	Campaign Signs	$	6,820.60
8/13/04	Andrew Bernstein	Expenses	$	282.15
8/16/04	BMT, Summers Street, Charleston, WV 25301	Online Service Fee	$	9.95
8/17/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	6,000.00
8/17/04	BrabenderCox 100 West Station Square Drive Pittsburgh, PA 15219	Production of TV Ad	$	10,000.00
8/19/04	United States Postmaster, Lee Street, Charleston, WV 25301	Stamps	$	148.00

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

8/20/04	Steve Cohen, 155 Elm Street, #2, Wheeling, WV 26003	Expenses	$	901.09
8/20/04	United States Postmaster, Lee Street, Charleston, WV 25301	Postage	$	18.43
8/23/04	Staples, Nitro Market Place, Cross Lanes, WV 25185	Computer Equipment	$	148.54
8/20/04	BrabenderCox 100 West Station Square Drive Pittsburgh, PA 15219	Television Ads	$	77,080.00
8/20/04	United States Postmaster, Lee Street, Charleston, WV 25301	Postage	$	13.66
8/20/04	Troy Andes, 5 Meadow Ridge Drive, Hurricane, WV 25526	Reimbursement Postage	$	13.65
8/23/04	Jason Wanbaugh, 38 W 7th Avenue, Apt. 7, Huntington, WV 25701	Expenses	$	50.00
8/24/04	West Virginia Radio Corp of Charleston, 1111 Virginia Street, East, Charleston, WV 25301	Radio Advertising	$	440.00
8/24/04	Bristol Broadcasting Co., Inc., P.O. Box 871, Charleston, WV 25323	Radio Advertising	$	720.00
8/25/04	Admix, 980 Woodward Drive, Charleston, WV 25312	Radio Advertising	$	439.90
8/25/04	WVHU	Radio Advertising	$	624.00
8/25/04	BB&T, Summers Street, Charleston, WV 25301	Check Charge	$	25.00
8/25/04	Delta Sign, P.O. Box 2341, Charleston, WV 25328	Banners	$	200.00
8/25/04	TigerSurplus.com 101 North Main Street Grand Saline, TX 75140	Computer Equipment	$	42.87
8/26/04	Jason Wanbaugh, 38 W 7th Avenue, Apt. 7, Huntington, WV 25701	Contract Labor	$	800.00
8/30/04	Adrich Business, 247 Capitol Street, Charleston, WV 25301	Office Supplies	$	78.96
8/31/04	Lowe's - South Charleston, WV 25309	Office Supplies	$	61.78
8/25/04	BB&T, Summers Street, Charleston, WV 25301	Check Charge	$	25.00
9/1/04	United States Postmaster, Lee Street, Charleston, WV 25301	Stamps	$	150.00
9/1/04	City of Charleston P.O. Box 2749 Charleston, WV 25330	Parking	$	300.00
			$	171,178.93

SCHEDULE 3B

UNPAID BILLS

(For information, see General Instructions, Page 5.)

Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount
	See Attached Listing		

(Enter Total on Page 1, Line 11) Total

OATH OR AFFIRMATION

I, Lora Abernathy, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement.

Signature of Candidate, Financial Agent or Treasurer

Date September 10 2004

Office Use Only

RECEIVED
SEP 10 PM 4:54

Schedule 3B - Upaid Bills
Benjamin for Supreme Court Committee

Date	Full Name, Address	Purpose	Amount
8/27/04	Color Copy Express, P.O. Box 219, Forest Hills, KY 41527	Buttons	$177.00
8/30/04	Hospitality Fare, P.O. Box 40052, Charleston, WV 25364	Catering	$1,450.00
8/28/04	Admix Broadcast Service, 960 Woodward Drive. Charleston, WV	Advertising	$72.03
			$1,699.03

STATE OF WEST VIRGINIA
CAMPAIGN FINANCIAL STATEMENT (LONG FORM)
IN RELATION TO 2004 ELECTION YEAR

For political committees, list the current election year. For candidates, list the current campaign or the year of an open past campaign.
Supply all information requested. It is required by WV Code §3-8-5a.

Benjamin for Supreme Court Committee	Lora Abernathy, Treasurer
Candidate or Committee Name Republican	Candidate or Committee's Treasurer P.O. Box 1869
Political Party (for candidates) Justice of the WVSCA	Treasurer's Mailing Address (Street, Route or P.O. Box) Charleston, WV 25327 304-344-0056
Office Sought (for candidates) District/Division	City, State, Zip Code Daytime Phone #

Reporting Period (check one)

☐ **Annual Report 2005 Calendar Year**
(Due last Saturday in March or within 6 days thereafter. This report filed for old campaigns or year following most recent election)

☐ **First General Report**
(Due first Saturday in September or within 6 days thereafter)

☐ ***Amended Report*** *(check if applicable)*
You must also check one box of appropriate reporting period

☐ **First Primary**
(Due last Saturday in March or within 6 days thereafter. This is the first report for current election year reporting)

☒ **Pre-general Report**
(Due 10 to 17 days before general or special election)

☐ **Pre-primary Report**
(Due 10 to 17 days before primary election)

☐ **Post-general Report**
(Due 25 to 31 days after general or special election)

☐ **Post-primary Report**
(Due 25 to 31 days after primary election)

☐ **Final Report**
(Zero balance required. PAC must also file Form Forn F-6 Dissolution)

* *post general may also be final report if "0" balance*

REPORT TOTALS

Fill in totals after you complete pages for contributions, fundraisers, other income, in-kind contributions, loans, expenditures, unpaid bills.

CONTRIBUTIONS OF MONEY	**Totals for this Period**
1. Contributions – Schedule 1A	142,605.00
2. Fund-raising Events – Schedule 2A	91,005.00
3. **TOTAL CONTRIBUTIONS** (Add lines 1 and 2)	233,610.00
4. Other Income – Schedule 3A	0
5. Loans received – Schedule 1B	0
6. **TOTAL OTHER INCOME** – (Add lines 4 and 5)	0
7. In-kind (non-cash) contributions Schedule 4A	1,836.86

EXPENDITURES	
8. Itemized Expenditures – Schedule 2B	370,656.52
9. Loan Repayent – Schedule 1B	0
10. **TOTAL**	

EXPENDITURES (Add lines 8 and 9)	370,656.52

OUTSTANDING LOANS/DEBTS

11. Unpaid Bills - Schedule 3B	1,408.55
12. Outstanding Loans – Schedule 1B	16,250.00
13. **TOTAL DEBTS** – (Add lines 11 and 12)	17,658.55

CASH BALANCE SUMMARY

A. Beginning Balance (ending balance from previous report)	181,199.47
B. Total Receipts (Add lines 3 & 6)	233,610.00
C. Subtotal (Add lines A & B)	414,809.47
D. Total Expenditures (Line 10)	370,656.52
E. Ending Balance (Subtract line D from line C)	44,152.95

**Cannot be negative balance*

TOTAL RECEIPTS
ELECTION YEAR-TO-DATE
(Add line B from all reports)

600,089.00

TOTAL EXPENDITURES
ELECTION YEAR-TO-DATE
(Add line D from all reports)

541,832.45

Official Form
F-7
Revised 7/03

Issued by the WV State Election Commission
(WV Code §3-8-5)

SCHEDULE 1A	CONTRIBUTIONS $250.00 OR LESS *(For information about contributions, see General Instructions, Page 3.)*	
DATE	CONTRIBUTOR'S FULL NAME OR COMMITTEE'S NAME	AMOUNT
	See Attached Sheets	

MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED

Subtotal contributions of $250.00 or less

CONTRIBUTIONS
$250.00 OR LESS
Benjamin for Supreme Court Committee

9/13/04	John	J.	Azar			$ 200.00
9/13/04					R&W Properties	$ 100.00
9/13/04	Howard	M.	Cloke	III		$ 100.00
9/13/04	David	E.	Hess			$ 250.00
9/13/04	Gayle	E.	Mason			$ 200.00
9/13/04	Steven		Howard			$ 50.00
9/15/04	Thomas	D.	MacMullan			$ 200.00
9/15/04	Ruth	Ann	Pollitt			$ 200.00
9/15/04	Jules	J.	Debaecke	Jr.		$ 200.00
9/15/04	Steven		Lear			$ 250.00
9/15/04	Wallace	M.	Rowland			$ 100.00
9/15/04	Gary	S.	Harding			$ 50.00
9/15/04	Edwin	W.	Levering	IV		$ 200.00
9/15/04	Samuel	C.	Rowland	III		$ 200.00
9/15/04	Ann	K.	Clapp			$ 200.00
9/15/04	Andrew	E.	Fox			$ 200.00
9/15/04	Joseph	A.	Martin			$ 50.00
9/15/04	David	H.	Rollins			$ 200.00
9/15/04	Michael	T.	Chesley			$ 150.00
9/15/04	William	D.	Chambers			$ 250.00
9/15/04	Robert	G.	Wood			$ 200.00
9/15/04	Todd		Meddaugh			$ 100.00
9/15/04	Linda	K.	Wallis			$ 100.00
9/15/04	R.	Paul	Comer			$ 102.00
9/16/04	William	Stanley	Presley			$ 100.00
9/16/04	G.	L.	Zeldner			$ 200.00
9/16/04	Charles	D.	Robinson			$ 250.00
9/20/04	Carl	A.	Liebig			$ 100.00
9/20/04	Clark	D.	Adkins			$ 200.00
9/20/04	Gary	W.	Cox			$ 100.00
9/21/04	Robert	A.	Wilka			$ 50.00
9/21/04	Linda	K.	Lessure			$ 100.00
9/22/04	Robert	J.	Bowers			$ 25.00
9/22/04	Philip	W.	Nichols			$ 150.00
9/22/04	Johnathan	R.	Waltrum			$ 50.00
9/28/04	Louis	J.	Constanzo	III		$ 100.00
9/28/04	Douglas	R.	Hardman			$ 200.00
9/28/04	Ron	E.	Smith			$ 100.00
9/28/04	L.	B.	Lyon	Jr.		$ 100.00
9/28/04	Patrick	D.	Deem			$ 250.00
9/28/04	R.	Daniel	Sondles			$ 250.00
9/28/04	Roger	W.	McManus			$ 250.00
9/28/04	J.	R.	Clark			$ 250.00
9/28/04	Robert	J.	Joyce			$ 250.00
9/28/04	Mehmet	V.	Kalaycioglu			$ 100.00
9/28/04	Douglas	A.	Smoot			$ 100.00
9/28/04	Leslie	F.	Ortlofield			$ 100.00
9/28/04	Roger	W.	McManus			$ 250.00
9/28/04	Thomas	V.	Grimm			$ 50.00
9/28/04	Edward	J.	Largent	III		$ 50.00
9/28/04	Robert	S.	Madden			$ 100.00

CONTRIBUTIONS
$250.00 OR LESS
Benjamin for Supreme Court Committee

9/28/04	George	Alan	Hall			$ 50.00
9/28/04	Richard	L.	Kinnaird			$ 100.00
9/28/04	Richard		Orr			$ 100.00
9/28/04	Douglas	P.	Carpenter			$ 100.00
9/28/04	David	O.	Digman			$ 150.00
9/28/04	Richard	K.	Niese	Jr.		$ 50.00
9/28/04	John	Martin	Haney			$ 125.00
9/28/04	Charles	P.	Hecker			$ 100.00
9/28/04	John	J.	Adornetto			$ 100.00
9/28/04	James	R.	Chapman			$ 75.00
9/28/04	Steven	J.	Summer			$ 250.00
9/30/04	Bradley	J.	Richardson			$ 100.00
9/30/04	John	M.	Sherwood			$ 100.00
9/30/04	Ronald	W.	Turner			$ 100.00
9/30/04	Luanne		Keseckar			$ 250.00
9/30/04	Stewart	M.	Borger			$ 250.00
9/30/04	Raymond		Knight			$ 5.00
9/30/04	Philip	L.	Stobie			$ 100.00
9/30/04	David		Hensley			$ 200.00
9/30/04	Paul	W.	Smart			$ 100.00
9/30/04	Louis	C.	Palmer			$ 100.00
9/30/04	Robert	L.	Buzzo			$ 50.00
9/30/04	Lester	D.	Brown			$ 20.00
10/1/04	Leonard		Fichter			$ 200.00
10/1/04	Christopher	D.	Jessie			$ 50.00
10/1/04					APNUOV	$ 250.00
10/1/04	Ralph	B.	Pistone			$ 100.00
10/4/04	W	J.	Whitlock			$ 100.00
10/4/04	Mert		Teter	Jr.		$ 70.00
10/4/04	Edwin	C.	Taylor			$ 200.00
10/4/04	L	H.	Smith	Jr.		$ 200.00
10/4/04	Christopher		Thu			$ 200.00
10/4/04	Samuel	O	Jasmon			$ 100.00
10/4/04	Stephen	J	Golder			$ 100.00
10/6/04	William	R.	Post			$ 100.00
10/6/04	O.	Stephen	Glatmeier			$ 50.00
10/6/04	Robert	S.	Thrasa			$ 100.00
10/6/04	Brent		Mansfield			$ 100.00
10/6/04	Mary	B.	Viane			$ 100.00
10/6/04	John	R.	Vanin			$ 100.00
10/6/04	William	C.	Ravencomb	Jr.		$ 100.00
10/6/04	Kenneth	G.	Haynes			$ 75.00
10/6/04	Trav		Hollins			$ 100.00
10/6/04	Lloyd	W	Miller			$ 25.00
10/6/04	George	Wm.	Deadrick	Jr		$ 100.00
10/6/04	Carl	F.	Agosten			$ 100.00
10/6/04	David	S	Taylor			$ 250.00
10/6/04	Michelle	L.	Brogan			$ 25.00
10/6/04	Ernest	L.	George			$ 25.00
10/6/04	Eugene	C.	Arnick			$ 25.00
10/6/04	Ralph		Sevy			$ 10.00
10/6/04	Cecil	P.	Walker			$ 50.00

BEST AVAILABLE COPY

CONTRIBUTIONS
$250.00 OR LESS
Benjamin for Supreme Court Committee

10/6/04	Craig	L.	Liebig			$	50.00
10/5/04	J.	Harvard	Rowland	Jr.		$	200.00
10/8/04	Robert	E.	Dreyer			$	50.00
10/8/04	B.	O.	Young			$	250.00
10/8/04	Michelle	C.	Hartleben			$	25.00
10/8/04	E.	Chris	Hughes			$	25.00
10/8/04	Michael	A.	Hass			$	100.00
10/8/04	Art		Poff			$	250.00
10/8/04	Philip	B.	Hill			$	100.00
10/8/04	Alvin	R.	Belcher			$	25.00
10/5/04	Steven	C.	Boggs			$	200.00
10/8/04	Timothy	F.	McLean			$	125.00
10/5/04	Samuel	J.	Argento			$	25.00
10/8/04	Charles	M.	Lowe			$	20.00
10/8/04	Eric	D.	Johnson			$	25.00
10/8/04	Douglas	R.	Waldron			$	50.00
10/8/04	Alan	L.	Pugh			$	50.00
10/8/04	Roger	B.	Lilly			$	25.00
10/8/04	Kenneth	E.	Rhone			$	25.00
10/8/04	Edward	L.	Pugh			$	35.00
10/8/04	D.	Stephen	Walker			$	100.00
10/8/04	Mark	E.	Readinger			$	100.00
10/11/04	J.	Waverly	Pulley	III		$	250.00
10/11/04	Michael	A.	Harris			$	100.00
10/11/04	Bill		Lipps			$	100.00
10/11/04	Danny		Elliott			$	250.00
10/11/04	Robert	L.	Morris			$	100.00
10/11/04	Pamela		Elliott			$	250.00
10/11/04	Jack	G.	Bapemore			$	200.00
10/11/04	James	J.	Eros			$	200.00
10/11/04	Allen	C.	Goolsby			$	250.00
10/11/04	Conrad	D.	Hammann			$	100.00
10/11/04	Wanda	G.	Sheppard			$	250.00
10/11/04	Harlan		White			$	250.00
10/11/04	Lance	E.	Oblinger			$	200.00
10/11/04	R.	L.	Gillam			$	50.00
10/11/04	R.	W.	Manderfield			$	100.00
10/11/04	James	F.	Smith			$	100.00
10/11/04	Richard		Sheets			$	25.00
10/11/04	Mark	W.	Halstead			$	25.00
10/11/04	T.	Carroll	Justice			$	250.00
10/11/04	Bill	R.	Browning			$	100.00
10/11/04	Bob		Milam			$	100.00
10/11/04	P.	W.	Southern			$	250.00
10/11/04	Thomas	A.	Gillam			$	100.00
10/11/04	Jane		Nash			$	25.00
10/11/04	Robert	M.	Huffman			$	100.00
10/12/04	P.	Scott	Icard			$	250.00
10/12/04	Kenneth	D.	Tuck			$	250.00
10/13/04	Lula	E.	Solano			$	250.00
10/13/04	Mark	W.	Simpson			$	200.00
10/13/04	Joseph	M.	Price			$	200.00

CONTRIBUTIONS
$250.00 OR LESS
Benjamin for Supreme Court Committee

10/13/04	Fred	R.	Daugherty			$	100.00
10/13/04	B.	Frederick	Duncan			$	250.00
10/13/04	Larry	R.	Edens			$	250.00
10/13/04	Harry	F.	Morris			$	250.00
10/13/04	Rick		Rubin			$	200.00
10/14/04	Amy	W.	Vaughan			$	100.00
10/14/04	Jean	B.	Friday			$	200.00
10/14/04	E.	Samuel	Guy			$	250.00
10/14/04	Sathyanarayan	M.	Reddy			$	250.00
10/14/04	Donald	H.	Hofmeister			$	200.00
10/15/04	Theodore	A.	Jackson			$	100.00
10/15/04	William	D.	Adams			$	100.00
10/15/04	Loran		Knicely			$	100.00
10/15/04	Ronnie		Dillard			$	200.00
10/15/04	M.	D.	Ward			$	100.00
10/15/04	Adam	C.	Rohrig	III		$	250.00
10/15/04	Phyllis	M.	Cole			$	200.00
						$	23,056.00

Schedule 1A

Contributions Over $250.00

Benjamin for Supreme Court Committee

01/30/04	Paul	h	McCorkle			103 Martin Drive	Beckley	WV	25801	Pittsburgh	Court Officer	0	500.00
01/30/04	Chris	B	Francis			[illegible] 2718	Leroy	WV	[illegible]	WV Hillbilly Association	Promoter	0	500.00
01/30/04	Jeffrey	Wesley	Jarvis[illegible]			[illegible] Kanawha Road	Poca[illegible]	WV	25159	Massey Energy	DFD	0	1,000.00
01/30/04	William	G.	Bias			1307 Bullitt Road	Charleston	WV	25314	Self	Physician	0	1,000.00
01/30/04	Kristin	M.	Marcin			291 Long Neck Point Road	Darien	CT	6820		Student	0	1,000.00
01/30/04	Paul	R	Francis			Route 1, Box 271 B	Leroy	WV	[illegible]	Francis Brothers Excavating	Partner	0	500.00
01/30/04	Patricia		Ayash			600 Pepsi Drive	St. Albans	WV	25177			0	1,000.00
01/30/04	Margaret	R	Patton			1530 MLK Jr Alpha Road	Charleston	WV	25304			0	1,000.00
01/30/04	Richard	W	Williams			Post Office 1589	Bluefield	WV	24701	Wal-Mart/Sam's Club	Senior	0	1,000.00
01/30/04	Edmund	T	Webb			410 Carriage Drive	Beckley	WV	25801	Self	Physician	0	500.00
01/30/04	Marilyn	M	Francis			291 Long Neck Point Road	Darien	CT	6820		Student	0	1,000.00
01/30/04	David	L	Baird			Post Office Box 361	Pikeville	KY	41502		Student	0	1,000.00
01/30/04	John	R	Baird			118 E. Maxwell Avenue	Lexington	KY	40508	Self	Attorney	0	1,000.00
01/30/04	Harvey	R.	Gluck	III		1101 Dolgate Avenue, Suite 201	Baltimore	MD	21286		N/A	0	500.00
01/30/04	Carolyn		Baird			Post Office Box 361	Pikeville	KY	41502		Homemaker	0	1,000.00
01/30/04	Joyce	E.	Baird			118 E. Maxwell Avenue	Lexington	KY	40508		Homemaker	0	1,000.00
01/30/04	Charles	L.	Baird			Post Office Box 361	Pikeville	KY	41502	Baird & Baird	Attorney	0	1,000.00
01/30/04	Adam		Rudd			127 Brentwood Lane	Beckley	WV	25801	Self	Physician	0	500.00
01/30/04	Kyle	R.	Hagy			167 Cornell Drive	Huntington	WV	25701	Self	Physician	0	500.00
02/09/04	Marcus		Comer			HC 84, Box 523	Lewisburg	WV	24901	Self	Physician	0	500.00
02/09/04	Kenneth	G.	Whiteleg			Post Office Box 394	St. Albans	WV	25177	Arch Coal	Management	0	1,000.00
02/09/04					Wise Virginia for Court	Post Office Box 485	Charleston	WV	25326		Pac	0	1,000.00
02/10/04	John	S.	Thomas			1204 Greenbrier Hills Drive	Vienna	WV	26105	Tri-State Roofing & Sheet Metal	Contractor	0	1,000.00
02/10/04	Cathy		Preston			Post Office Box 448	Williamsburg	KY	41769	Long Fork Coal Company	Administration	0	500.00
02/10/04	James	W.	Reed			Post Office Box 307	Clay	WV	25043	Reed Brothers	Owner	0	1,000.00

Blank Occupation In Process
See Attached Letter

Schedule 1A

Contributions Over $250.00
Benjamin for Supreme Court Committee

[redacted]					PO Box 388	Lesage	WV	25537	State Farm	Insurance Agent	$ 500.00
[redacted]					[redacted] Public Office	Charleston	WV	25305	Public Employees Ins.	CPO	$ 1,000.00
[redacted]					112 Maplewood Drive	Bomb Depot	WV	25504	Public Employment	Sales	$ 500.00
[redacted]					Post Office Box 330	Nashville	TN	37202		PAC	$ 500.00
[redacted]						Pella Mill	WV	25547	Manufacturing Machine	Owner	$ 1,000.00
[redacted]					Post Office Box 157	Hardy	KY	41531	Coal Equipment	Owner	$ 1,000.00
[redacted]					100 Pebble Drive 10010	Prestonville	OH	42666	Self	Insurance Agent	$ 500.00
[redacted]					Post Office Box 166	Jenny	KY	41514	Capital County Airline	Controller	$ 500.00
[redacted]					Post Office Drawer 666	Athens	WV	24712			$ 1,000.00
[redacted]					Post Office Drawer 666	Athens	WV	24712			$ 1,000.00
[redacted]					1600 W 6th Avenue	Williamson	WV	25661	Underwriter Clerk	Benefits	$ 1,000.00
[redacted]					1600 W 6th Avenue	Williamson	WV	25661			$ 1,000.00
[redacted]					Post Office Box 367	Vanderpool	WV	25672	Bellomy & Associates	Owner	$ 1,000.00
[redacted]					Post Office Box 157	Hardy	KY	41531		Housewife	$ 1,000.00
[redacted]					Post Office Box 265	Varney	WV	25696	Universal Coal	Manager	$ 1,000.00
[redacted]					Post Office Box 448	Belfry	KY	41514		Student	$ 1,000.00
[redacted]					Post Office Box 263	Varney	WV	25696	Universal Coal	Vocation Rehabilitation	$ 1,000.00
[redacted]					Box 100	Williamson	WV	25661	Regional Christian School	Teacher	$ 1,000.00
[redacted]				Bank One Corporation	1 Bank One Plaza	Chicago	IL	60670		PAC	$ 1,000.00
[redacted]					2935 Matlida Drive	Bluefield	WV	24605	Public Employees	Owner	$ 500.00
[redacted]					23 Bridge Woods Road	Charleston	WV	25314	Jackson Kelly	Attorney	$ 500.00
[redacted]					Post Office Box 448	Charleston	WV	25322	City of Charleston	Mayor	$ 1,000.00
[redacted]					1800 Parkwood Road	Charleston	WV	25314	Bailey & Wyatt	Attorney	$ 1,000.00
[redacted]				[redacted] Company	Post Office Box 26765	Richmond	VA	23219		PAC	$ 1,000.00
[redacted]					407 W. Second Drive	Clarksburg	WV	26301		Housewife	$ 1,000.00
[redacted]					Post Office Box 759	Kenvil	WV	25607	John's Trucking	Owner	$ 1,000.00

Blank Occupation in Process
See Attached Letter

Schedule 1A

Contributions Over $250.00

Benjamin for Supreme Court Committee

6/29/04	Karin		Berlin			Route 1 Box 189	Williamson	WV	25661	Berlin Trucking	Secretary	$	1,000.00
6/29/04	Linda		Berlin			Route 1 Box 189	Williamson	WV	25661	Berlin Trucking	Corporate Secretary	$	1,000.00
6/29/04	Riley	Lee	Berlin			Route 1 Box 189	Williamson	WV	25661	Berlin Trucking	President	$	1,000.00
6/29/04	Gary		Wheyland			114 Mingo Ridge Drive	Hurricane	WV	25526	ED4	IT	$	500.00
6/29/04	Riley	Dale I	Berlin			Post Office Box 905	Kenova	WV	25530	Gold Trucking	Owner	$	1,000.00
6/29/04	A.	Patricia	Morrison			Route 3 Box 330R	Charleston	WV	25311	3817	Banker	$	1,000.00
6/29/04	C.	C	McCoy	Jr.		9 Crown Point	Princeton	WV	24740	Tyson	Salesman	$	300.00
6/29/04	R.	Charles	Mosby	III		Post Office Box 79	Old Fields	WV	26845	Summit Financial	CEO	$	500.00
6/29/04	Charles	A.	Peters			Post Office Box 1000	Bluefield	WV	24605	Peters Equipment	Owner	$	500.00
6/29/04	Robert	A.	Britton			HC 78, Box 104	Canvas	WV	26562	Self	Consulting Engineer	$	500.00
6/29/04	B.	R.	Calhoun			Post Office Box 159	Bedford	KY	40006	[illegible]	Management	$	1,000.00
6/29/04	Linda		Deskins			Route 1, Box 160	Williamson	WV	25661			$	1,000.00
6/29/04	Edwin	R.	Deskins			Post Office Box 516	Lenore	WV	25676			$	1,000.00
6/30/04	Don		Moore			25 Fox Chase Road	Charleston	WV	25304	Bud's Auto Group	Owner	$	1,000.00
6/30/04	Lee		Snyder			159 Lens Gap Road	Clayton Town	WV	25114	Snyder Environmental Services, Inc.	Owner	$	500.00
7/01/04	A.	Alex	Porter			500 Fifth Avenue	New York	NY	10110	Porter, Felleman, P.C.	Partner	$	1,000.00
7/01/04	Robert	W	Stephen	Jr.		Post Office Box 2190	Clarksburg	WV	26302	Stephen & Johnson	Attorney	$	500.00
7/01/04	Robert	J.	Fanning	Jr.		1307 Mount DeChantal Road	Wheeling	WV	26003	Self	Physician	$	1,000.00
7/01/04	S.	Dave	Warde			101 2nd Avenue	Morgantown	WV	26764	BOR Realty	Sales/Land Manager	$	1,000.00
7/04/04	Chris	C.	Dicky			14 Sherry Woods	Charleston	WV	25314		Self-Employed	$	1,000.00
7/04/04	Michael	W.	Reed			1307 Shenandoah Road	Wheeling	WV	26003	Self	Physician	$	500.00
7/04/04	Steven	F.	Daily			16 Dogwood Woods	Charleston	WV	25314	Premier Bank	President	$	500.00
7/04/04	Larry	H.	McSweeney			Post Office Box 1997	Chesapeake	OH	45619	McSweeney's	Owner	$	500.00
7/04/04					Nationwide	One Nationwide Plaza, 1-07-10	Columbus	OH	43215		PAC	$	1,000.00
7/04/04					Massmutual	One Park Road Port	Stamford	CT	4906		PAC	$	1,000.00
7/04/04	Thomas	S.	Cook			2001 Kanawha Avenue	Dunbar	WV	25064	Pauley & Smith	President	$	500.00

Blank Occupation In Process
See Attached Letter

Schedule 1A

Contributions Over $250.00
Benjamin for Supreme Court Committee

10/6/04	Robert	S.	Wolff			2179 Highway 52	Logan	WV	25601			$ 500.00
10/6/04	Raymond	A.	Fortin			5207 Peony Lane	Vienna	WV	26105	Wetzel Insurance Agency	Insurance Agent	$ 750.00
10/6/04	Clint		Hughes			12 Karen Court	Barboursville	WV				$ 500.00
10/6/04	John	W.	Crites			48 Point Drive	Parkersburg	WV	26104	Allegheny Wood Products	President	$ 850.00
10/6/04	Brent		Metz			1108 Skyline Circle	Charleston	WV	25314		Retired	$ 1,000.00
10/6/04	Michael	J.	Dye			104 Forest Drive	Clarksburg	WV	26301		RIA	$ 500.00
10/6/04	John	D.	Wiseman			107 Hawksbill Lane	Charleston	WV	25311			$ 1,000.00
10/6/04	Jeffrey	S.	Eggleston	Jr.		909 Quail Drive	Bluefield	VA	24605	Acordia	Management	$ 1,000.00
10/6/04	Ferrell	H.	Rubin			904 Bird Road	Charleston	WV	25314	Dunnevant & Dent	Attorney	$ 1,000.00
10/6/04	Robert	A.	Crichton	Jr.		421 Sunrise Drive	Weirton	WV	26062	C&M Civil Construction	Contractor	$ 500.00
10/6/04					WV Academy of Ophthalmology	1258 Preston Drive	Morgantown	WV	26505		PAC	$ 1,000.00
10/6/04					CSX Corporation	1331 Pennsylvania Ave., NW Suite 560	Washington	DC	20004		PAC	$ 1,000.00
10/6/04	Dennis	M.	Burton			126 Silver Brook Pointe	Morgantown	WV	26505	Ameritest	Physician	$ 500.00
10/6/04	Charles	H.	Haden	II		PGA Office Box 6867	South Charleston	WV	25309	Oakhill TMX Sales Corp.	Truck Dealer	$ 300.00
10/6/04	Jeanne	S.	Hamilton			Drawer 550 Liberty Hill	Lewisburg	WV	24901		Housewife	$ 1,000.00
10/6/04	Richard	C.	Snedden			3420 Yeh Street Road	Huntington	WV	25701	Pierce, Inc.	President	$ 1,000.00
10/6/04	Patricia	M.	Sutherland			3410 Chesterfield Avenue	Charleston	WV	25304	MCS Construction	Owner	$ 1,000.00
10/6/04	Lucretia	L.	Vanetzian			2233 Hickory Creek Ct., Apt. 1-A	Richmond	VA	23294			$ 400.00
10/6/04	John	C.	Hill			4061 Saddlebrook Trail	Owensboro	KY	42303	Ancor Company	Operating Manager	$ 1,000.00
10/6/04	R.	Marshall	Evans			3667 Peachtree Road, Unit 110	Atlanta	GA	30319	Hubbard Properties, Inc.	President	$ 1,000.00
10/6/04	R.	Arturo	Rao			3 Starkwood Drive	Huntington	WV	25701	TSO	Physician	$ 300.00
10/6/04	Thomas	J.	Cole			800 Dellwood	Bluefield	WV	24701	Cole Chevrolet	Auto Dealer	$ 500.00
10/6/04	Edward	T.	Gartner			PGA Office Box 348	Charleston	WV	25322			$ 1,000.00
10/6/04	Ralph	B.	Smith	Jr.		1213 Quarrier Street	Charleston	WV	25301	SMI	Physician	$ 1,000.00

Blank: Occupation In Process
See Attached Letter

Schedule 1A

Contributions Over $250.00

Benjamin for Supreme Court Committee

10/[illegible]	Howard		Kinberg			1328 National Road Apartment 3	Wheeling	WV	26003	Marshall County Imaging	Physician	$ 500.00
10/[illegible]	Lee		Fairchild			1606 Woodmere Drive	Charleston	WV	25314	Spilman, Thomas	Attorney	$ 500.00
10/[illegible]	George	A	Patterson	III		3 Chitwood Road	Charleston	WV	25304	Bowles, Rice	Attorney	$ 1,000.00
10/[illegible]	Linda	P	Smith			Post Office Box 3081	Wheeling	WV	26003	State Farm	Insurance Agent	$ 1,000.00
10/1 1/04	Todd		Money			1 Madeline Court	Madison	WV	25130			$ 1,000.00
10/1 1/04	Fred		Reynolds			Post Office Box 157	Danville	WV	25053	Danville	City Councilman	$ 1,000.00
10/1 1/04	C.	B.	Travers			39 Mercer Street	Hurricane	WV	25526	Baker Truck	General Manager	$ 500.00
10/1 1/04	John	H.	Wilkie			Post Office Box 39	Logan	WV	25601			$ 1,000.00
10/1 1/04	L.	Alex	McSweeney			5480 CO RD 18	South Point	OH	45680	McSweeney's Inc.	Management	$ 500.00
10/ 1/04	Gregory	B.	Robertson			5808 Nichols Road	Richmond	VA	23226	McGuire Woods & Williams	Attorney	$ 1,000.00
10/ 1/04	William	R.	Grant			510 Fifth Avenue	New York	NY	10036	Salem Associates	Chairman	$ 1,000.00
10/ 1/04	Michael	W.	Buffenbarger			401 Sun Drive	Spartanburg	PA	18143	Joy Mining Machinery	President	$ 1,000.00
10/ 1/04	Randall	L.	Carpenter			Post Office Box 188	Logan	WV	25601	Aracoma, Inc.	Owner	$ 1,000.00
10/ 1/04	R.	Wood	Thrasher			Post Office Box 1680	Clarksburg	WV	26302	Thrasher Engineering	Owner	$ 500.00
10/ 1/04	Mathew		Paul			Post Office Box 367	Logan	WV	25601			$ 500.00
10/ 1/04					Pfifi Thiel Benzorp	511 Kenilworth Square Place	Cincinnati	OH	45206		PAC	$ 500.00
10/ 1/04	Margaret	B.	Fahrenbacher			2402 3rd Avenue	Vienna	WV	26105		Housewife	$ 1,000.00
10/ 1/04	Captain		Gibson			625 Taylor Fork	Belfry	KY	41514			$ 500.00
10/ 1/04	Matthew	R.	King			Post Office Box 3511	Bluefield	VA	24701			$ 500.00
10/ 1/04	T.	L.	Robinson			2008 Washington Street, W.	Cross Lanes	WV	25313	E.L. Robinson Engineering	Engineer	$ 500.00
10/ 1/04	William		Ellsworth			918 Country Club Circle	Charleston	WV	25314	Self	Investor	$ 500.00
10/ 1/04	Deborah	L.	Hatfield			2210 Leaf Ridge Drive	Charleston	WV	25302		Homemaker	$ 1,000.00
10/ 1/04	Stephen	D.	Wilkie			18 Crestcliff Road	Charleston	WV	25301	McJunkin	Exec	$ 1,000.00
10/13/04	Ryan		Wheelerman			1804 Woodmere Drive	Charleston	WV	25314	Wolfe Impressions	Partner	$ 1,000.00
10/13/04	David	M.	Flannery			Post Office Box 880	Charleston	WV	25323	Jackson Kelly	Attorney	$ 500.00

Blank Occupation In Process
See Attached Letter

Schedule 1A

Contributions Over $250.00
Benjamin for Supreme Court Committee

12/13/04	Joseph	B.	Benn			1706 Hillside Drive	South Charleston	WV	25303	Appalachian Mediation	Attorney	$ 500.00
10/1/04					Allegheny Power	10435 Somerville Pike	Hagerstown	MD	21740		PAC	$ 1,000.00
10/1/04					St. Paul Travelers	One Tower Square	Hartford	CT	6183		PAC	$ 1,000.00
10/1/04					West Virginia Society of CPAs	Post Office Box 2119	Parkersburg	WV	26102		PAC	$ 1,000.00
10/ 4/04	Andrew	A.	Payne	III		500 Capitol Street, Suite 1600	Charleston	WV	25301	Self	Land Management	$ 1,000.00
10/14/04	John	E.	Dudish			49 Orchard Road	Wheeling	WV	26003	Self	Physician	$ 500.00
10/14/04	Mathew	A.	Dutton			Post Office Box 907	Dale City	VA	22193	AMCI Energy	Executive VP	$ 1,000.00
10/ 4/04	John	F.	Childers	Jr.		500 Washington Boulevard	Huntington	WV	25701		Retired	$ 500.00
10/14/04	Barton	W.	Johnson			259 Scarlight Drive	Escondido	CA	37917	United Central	Management	$ 1,000.00
10/14/04	Robert	O.	Bradford			Post Office Box 489	Prenton	WV	24974			$ 1,000.00
10/14/04	Philip	B.	Payne			8 Dale Creek Road	Charleston	WV	25314	Office of the Governor	Owner	$ 1,000.00
10/14/04	Luster	Lewis D.	Payne	JR		8 Dale Creek Road	Charleston	WV	25314	Self	Land Management	$ 1,000.00
10/14/04					BB&T	100 S. Stratford Road	Winston-Salem	NC	27104		PAC	$ 1,000.00
10/14/04	Bert	A.	Nohe			4 Waterfield Drive	Coral Gables	FA	33133			$ 1,000.00
10/1/04					Pfizer	235 East 42nd Street	New York	NY	10017		PAC	$ 1,000.00
10/1/04	John	R.	Stephens			3 Claymont Road	Charleston	WV	25314	Dinsmore & Shohl	Owner	$ 500.00
10/13/04	Richard	C.	Ward			3109 Montavesta Road	Lexington	KY	40502	Alltel	Management	$ 1,000.00
10/18/04	James	E.	Markenell			5628 Valley Drive 39	Bristol	TN	37620			$ 1,000.00
10/13/04	Ruskin		Brown			609 Virginia Road	Charleston	WV	25302	Bowles Rice	Attorney	$ 500.00
10/13/04	Chad	A.	Grantham			265 Pine Cycle	Dunbar	WV	25064	All Crane	Management	$ 500.00
10/18/04	Andrew	J.	Pancake			14 Fairway Drive	South Charleston	WV	25309	Acordia	Management	$ 1,000.00
10/18/04	John	R.	Tawse	JR		1520 Virginia Street, E.	Charleston	WV	25311	Bowles Rice	Attorney	$ 500.00
10/1/04	Timothy	P.	Lovett			108 River Pointe Drive	Pod House	WV	25160	Self	Contractor	$ 500.00
10/18/04	Elizabeth	Lee	Hunter			1018 Kanawha Road	South Charleston	WV	25303	Acordia	Insurance	$ 500.00
10/18/04	James	W.	Harvey			Post Office Box 269	Poca	WV	25159	Acordia	Insurance	$ 500.00
												$ 110,650.00

Blank Occupation In Process
See Attached Letter

«Prefix» «FirstName» «MiddleName» «LastName» «Suffix»
«OrganizationName»
«Address»
«City», «State» «Postal_Code»

Dear «Prefix» «LastName»:

Thank for your contribution to the Brent Benjamin for Supreme Court Campaign. Your contribution to the campaign makes it possible to begin purchasing our commercial spots for this fall. Now that the primary is over, the race is heating up and we have an even greater amount of work to be done.

Your support and financial help are greatly appreciated. I know how hard people work for their money and because of that we will spend your money as wisely as we would spend our own.

State Campaign Finance Law requires that we list the occupation and employer for contributions over $250. Would you please fill out the enclosed contribution card and return it by October 24, 2004, in the enclosed self-addressed, stamped envelope?

You have given the campaign a great boost. Together, we can elect a judge who will return equal justice and fairness to our Supreme Court.

Sincerely,

Rob Capehart
Campaign Manager

RCC:ncg

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 9-3-04	**Type of Event** Breakfast
Name of Place Held The Greenbrier	
Address of Place Held White Sulphur Springs, WV 24986	
Total Receipts $3,800.00	**Total Expenditures** $697.47
NET RECEIPTS (Subtract total expenditures from total receipts) $3,102.53	

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees.* *(For additional information, see General Instructions, Page 4.)*

$250.00 OR LESS

Date	Full Name	Amount
	See Attached Listing	

Schedule 2A - Fund- Raising Events
Benjamin for Supreme Court Committee
Business Summit Fund Raiser Less Than $250

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
John	R.	Cheetham	$	250.00
Marsha	H.	Slater	$	50.00
			$	300.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Business Summit Fund-Raiser

Jessica	S.	Carney		3 Quarry Ridge	Charleston	WV	25304		Housewife	$ 1,000.00
Bruce	G.	Widmeyer		30 Renaissance Way	Wheeling	WV	26003	EMP	Personnel Manager	$ 1,000.00
			Eastern Associated Coal Corp	Box 1233	Charleston	WV	25324		PAC	$ 1,000.00
Allison	K.	Dean		825 Riverdell Drive	Bridgeport	WV	26330		Housewife	$ 500.00
T.	M.	Boggs		29 Hickory Drive	Barboursville	WV	25504	WV Chamber of Commerce	VP and CFO	$ 1,000.00
			Chamber PAC	Post Office Box 2789	Charleston	WV	25330		PAC	$ 1,000.00
										$ 6,500.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 06/08/04	**Type of Event** Reception
Name of Place Held Parkersburg Country Club	
Address of Place Held 4910 Ice Avenue, Vienna, WV 26105	
Total Receipts $9,555.00	**Total Expenditures** -0-
NET RECEIPTS (Subtract total expenditures from total receipts) $9,555.00	

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees. (For additional information, see General Instructions, Page 4.)*

$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Parkersburg Fundraiser

M.	David	Arlington	22 Fairview Heights	Parkersburg	WV	26101	9/13/04	Self	Physician	$	300.00
Frederick	David	Gillespie	1225 Market Street	Parkersburg	WV	26101	9/13/04	Self	Physician	$	1,000.00
Stanley	M.	Pennville	434 Rector Road	Parkersburg	WV	26106	9/13/04	Self	Physician	$	1,000.00
Logan	W.	Hare's	4804 River Road	Vienna	WV	26105	9/13/04	Self	Physician	$	1,000.00
Michael	A.	Senior Jr	830 Eighteenth Street	Parkersburg	WV	26101	9/13/04	Self	Physician	$	500.00
M.	David	Addington	22 Fairview Heights	Parkersburg	WV	26101	9/13/04	Self	Physician	$	300.00
David		Chegy	8810 Grimsby Place	Vienna	WV	26105	9/13/04	Self	Physician	$	1,000.00
Barry	J.	Lifton	14 Westwood Drive	Parkersburg	WV	26100	9/21/04	Self	Physician	$	500.00
W.	Michael	Hensley	132 Westgewood Place	Parkersburg	WV	26101	9/28/04	Self	Physician	$	500.00
David	C.	Mendoza	76 Catalina Drive	Parkersburg	WV	26104	9/28/04			$	500.00
Thomas	L.	McCarty	1727 Washington Avenue	Parkersburg	WV	26100	10/4/04	Architectural Products	President	$	500.00
H.	Bruce	Falgren	Route 9, Box 215	Parkersburg	WV	26101	10/19/04	Falgren Inc.	Executive	$	500.00
										$	7,600.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Parkersburg Fundraiser

George		Gevas	$ 50.00
F.	Richard	Hall	$ 100.00
Candace	D.	Jones	$ 25.00
Di	Ann	Krivchenia	$ 250.00
Daniel		McPherson	$ 250.00
Rick		Modesitt	$ 75.00
Michael	A.	Morehead	$ 250.00
John	N.	Ralsten	$ 125.00
John	N.	Ralsten	$ 30.00
H.	David	Ramsey, Jr.	$ 100.00
Harry		Shannon	$ 250.00
Peter	W.	Strobl	$ 100.00
J.	Michael	Weber	$ 100.00
Eleftherios	S.	Xenos	$ 250.00
			$ 1,955.00

SCHEDULE 2A

FUND-RAISING EVENTS

EVENT SUMMARY

Date of Event 9/21/04 Type of Event Reception

Name of Place Held Carol and Matt Miller's Home

Address of Place Held 1316 12th Street, Huntington, WV

Total Receipts $23,300.00 Total Expenditures $623.68

NET RECEIPTS (Subtract total expenditures from total receipts) $22,676.32

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees.* ***(For additional information, see General Instructions, Page 4.)***

$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	

Subtotal contributions of less than $250.00

OVER $250.00

Date		Amount
	Full Name Address Contributor's job: (Individual only) Where works: (Individual only) Affiliation: (Political committee only)	
	Full Name Address Contributor's job: (Individual only) Where works: (Individual only) Affiliation: (Political committee only)	
	Full name Address Contributor's job: (Individual only) Where works: (Individual only) Affiliation: (Political committee only)	
	Full name Address Contributor's job: (Individual only) Where works: (Individual only) Affiliation: (Political committee only)	
	Full Name Address Contributor's job: (Individual only) Where works: (Individual only) Affiliation: (Political committee only)	

Subtotal contributions of more than $250.00

Subtotal contributions of $250.00 or less

(Enter Total on Page 1, Line 2) TOTAL

MAKE COPIES OF THIS PAGE TO LIST ADDITIONAL CONTRIBUTIONS. ATTACH ADDITIONAL PAGES TO REPORT.

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Huntington Fundraiser

W.	B.	Andrews		$ 100.00
David	A.	Caudill		$ 250.00
William	N.	Cunningham		$ 250.00
Stacie		Davis		$ 100.00
Naomi	F.	Dillard		$ 200.00
William	J.	Echols		$ 100.00
Nancy	W.	Echols		$ 100.00
Michael	J.	Emerson		$ 250.00
Michael	E.	Estep		$ 25.00
Andrew	W.	Fischer		$ 250.00
David		Fox	Jr.	$ 200.00
Charles	K.	Gould		$ 50.00
Judith	A.	Guye		$ 50.00
Steve		Hamer		$ 250.00
Richard		Houvouras		$ 100.00
Arnold	J.	Janicker		$ 50.00
John	E.	Jenkins	Jr.	$ 50.00
Patricia	A.	Jennings		$ 50.00
Henry	M.	Keyes		$ 100.00
Calvin	A.	Kent		$ 100.00
Ted	V.	Kluemper	Jr.	$ 50.00
P.	Thomas	Krieger		$ 100.00
William	J.	McGee		$ 100.00
Francis	W.	McGuire		$ 100.00
Phillip	L.	McMullen		$ 200.00
Craig		Morgan		$ 200.00
Bill		Murdock		$ 100.00
Russell		Rucker	Jr.	$ 250.00
Thomas	E.	Scarr		$ 150.00
Thomas	F.	Scott		$ 100.00
Stephen	L.	Sobert		$ 260.00
Steven		Wellman		$ 25.00
Luther	E.	Woods		$ 100.00
				$ 4,360.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Huntington Fundraiser

George		Belden	1 Lewis Street	Huntington	WV	25702	Self	Dentist	$	500.00
R.	L.	Bolen	Post Office Box 2152	Huntington	WV	25722	Huddleston & Bolen	Attorney	$	1,500.00
Nick		Carter	P.O. Box 2827	Huntington	WV	25727	WPPLP	Comp. Exec.	$	500.00
Robert		Childers	6 Fairway Drive	Huntington	WV	25705			$	500.00
Kerry	P.	Dilkind	139 Sheldon's Park Drive	Huntington	WV	25705	Blue & DCard, Inc.	Insurance Agent	$	1,000.00
E.	Keith	Earles	333 Woodland Drive	Huntington	WV	25705	Tri-state Express	Management	$	500.00
Michael	L.	Farrell	143 Woodland Drive	Huntington	WV	25705	Farrell, Farrell, & Farrell	Attorney	$	500.00
Mike		Gerber	600 Southwood Heights	Huntington	WV	25701	Hayflich & Steinberg	CPA	$	500.00
Carl	C.	Grover	1 Electric Road	Milton	WV	25541	Engines Inc.	Owner	$	500.00
R.	Sterling	Hall	Post Office Box 1178	Huntington	WV	25715	Huntington Steel	Board	$	500.00
James	E.	Hanser	208 Oakview Drive	Kenova	WV	25530	Hanser Pellet Fuel	Owner	$	1,000.00
Lori		Hanser	Post Office Box 410	Kenova	WV	25530	Hanser Pellet Fuel	President	$	500.00
Steve	P.	Hellen	Post Office Box 2369	Huntington	WV	25724	Northwestern	Insurance Agent	$	500.00
Arch	T.	Keller	14 Kensington Lane	Huntington	WV	25705	Insurance Systems, Inc.	Insurance Agent	$	1,000.00
Jack		Kim	3 Mortimer Place	Huntington	WV	25701	Jack Kim	Consultant	$	500.00
John	R.	LaFear	200 Wilshire Boulevard	Huntington	WV	25701	Hay, Fitch & Steinberg	CPA	$	1,000.00
Mark		Miller	1516 12th Street	Huntington	WV	25701	Dutch Miller Chevrolet	Owner	$	1,000.00
Craig	M.	Morgan	200 Camelot Drive	Huntington	WV	25701	Self	Physician	$	500.00
Edward	W.	Morrison, Jr.	415 Whitaker Blvd. W	Huntington	WV	25701			$	500.00
C.	R.	Neighborgall, IL	1 Fairway Drive	Huntington	WV	25705	Neighborgall Construction	Owner	$	1,000.00
Robert	H.	Price, III	8 Delta Drive	Huntington	WV	25705	Self	Distributor	$	500.00
Russell	R.	Rucker, III	Post Office Box 409	Huntington	WV	25705	Rucker, Sibupa, & Fowler	Insurance Agent	$	1,000.00
Michael	B.	Sebards	60 Mayfair Way	Huntington	WV	25705	St. Mary's Hospital	Administrator	$	500.00
Robert	M.	Sebards	404 Greenmill Drive	Huntington	WV	25705		Retired	$	500.00
Christopher	L.	Slaughter	14 Montana Estates	Cross Lanes	WV	25313	Slaughter & Johnson	Attorney	$	350.00
Phillip	R.	Stevens	708 South Boulevard	Huntington	WV	25701	self	Physician	$	1,000.00
Richard	E.	Thompson	3616 Piedmont Road	Huntington	WV	25704			$	500.00
Joseph		Towne	7070 Stevenson Road	Huntington	WV	25702	Self	Physician	$	500.00
Gary		Wells	373 Central Avenue	Logan	WV	25601	International Industries	President	$	1,000.00
									$	18,150.00

256a

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 09/10/04	Type of Event Reception
Name of Place Held John and Sarah Wade's House	
Address of Place Held Point Pleasant, WV	
Total Receipts $3,550.00	Total Expenditures 0
NET RECEIPTS (Subtract total expenditures from total receipts) $3,550.00	

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees.* ***(For additional information, see General Instructions, Page 4.)***

$250.00 OR LESS

Date	Full Name	Amount
	See attached sheets	

Schedule 2-A Fund-Raising Events
Benjamin for Supreme Court Committee
Point Pleasant Fund Raiser Less than $250

William	A.	Barker		$ 200.00
Ronald	A.	Taylor		$ 100.00
James	H.	Lewis		$ 100.00
Miles	S.	Epling		$ 50.00
Jon		Pernack		$ 100.00
Donald	E.	Waldie		$ 50.00
Michael	W.	Cortin		$ 100.00
R.	Michael	Shaw		$ 150.00
Clyde		Rorrer	Jr.	$ 100.00
Anthony	J.	McElowney		$ 250.00
				$ 1,200.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Point Pleasant Fund Raiser

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	L.	[illegible]	[illegible]	[illegible]	WV	[illegible]	Self	Physician	$ 800.00
[illegible]	K.	[illegible]	2520 Valley Drive	Point Pleasant	WV	[illegible]	Self	Physician	$ 700.00
[illegible]	R.	[illegible]	[illegible]	[illegible]	WV	[illegible]	Pleasant Valley	Administrator	$ 500.00
[illegible]	William	McCleary, Jr.	2520 Valley Drive Suite 211	Point Pleasant	WV	[illegible]	Self	Physician	$ 800.00
[illegible]		[illegible]	2520 Valley Drive, Suite 214	Point Pleasant	WV	[illegible]	Self	Physician	$ 600.00
[illegible]	P.	[illegible]	Valley Drive, Suite 212	Point Pleasant	WV	[illegible]	Self	Physician	$ 1,000.00
Young	I.	[illegible]	R.R.1, Box 760	Point Pleasant	WV	[illegible]	Self	Physician	$ 300.00
[illegible]	C.	[illegible]	Post Office Box 237	Point Pleasant	WV	[illegible]	Self	Physician	$ 500.00
									$ 4,[illegible]

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 10/6/04 **Type of Event** Reception

Name of Place Held Oliverio's & VisVineo

Address of Place Held 587 E. Main Street, Bridgeport, WV 26330

Total Receipts $14,640.00 **Total Expenditures** $1,176.50

NET RECEIPTS (Subtract total expenditures from total receipts) $13,463.50

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$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	
	Subtotal contributions of less than $250.00	

OVER $250.00

Date		Amount
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Subtotal contributions of more than $250.00	
	Subtotal contributions of $250.00 or less	
	(Enter Total on Page 1, Line 2) TOTAL	

MAKE COPIES OF THIS PAGE TO LIST ADDITIONAL CONTRIBUTIONS. ATTACH ADDITIONAL PAGES TO REPORT

Schedule 2A Fund-Raising Events
Benjamin for Supreme Court Committee
Clarksburg Fund Raiser

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
			DOC PAC	Route 1, Box 353	Clarksburg	WV	26301		PAC	$	1,000.00
John	C.	Allen		HC 81 Box 28	Coalton	WV	26287	J.F. Allen Company	President	$	500.00
David	S.	Alvarez		448 Locust Street	Bridgeport	WV	26330	Self	Contractor	$	500.00
Marcia	Allen	Broughton		Post Office Box 645	Clarksburg	WV	26701			$	300.00
Matthew	P.	Dorsella		1007 Briarwood Road	Bridgeport	WV	26330	Self	Physician	$	750.00
Tim		Dyer		RR 1 Box 256B	Clarksburg	WV	26301	Dyer Insurance Agency	Agent	$	1,000.00
Michael	D.	Griffith		RR 1, Box 480	Clarksburg	WV	26301	J.F. Allen Company	Corporate Officer	$	1,000.00
Robert	E.	King		433 Hampton Center	Morgantown	WV	26305	Self	Physician	$	500.00
Carl	W.	Liebig		109 Upstore Drive	Bridgeport	WV	26330	Self	Physician	$	500.00
B.	Mae	Moran		104 Hillsboro Drive	Bridgeport	WV	26330	Self	Physician	$	400.00
Sundrice		Nowaco		101 Forest Drive	Clarksburg	WV	26301	Self	Physician	$	1,000.00
J.	William	Pulice		8 Chenoweth Drive	Bridgeport	WV	26330	Allstate	Insurance Agent	$	500.00
Steven	P.	Thompson		214 Buchannon Avenue	Clarksburg	WV	26301	United Security Agency	Insurance Agent	$	1,000.00
										$	8,650.00

Schedule 2A Fund-Raising Events Less Than $250.00
Benjamin for Supreme Court Committee
Clarksburg Fund Raiser

Frank	K.	Abruzzino	$ 250.00
Robert	V.	Allen	$100.00
Gaspar	Z.	Barcomas	$100.00
William	H.	Bowie	$250.00
Mary	M.	Boyle	$40.00
Michael	L.	Bray	$250.00
David	L.	Corsaro	$100.00
Joseph	A.	Dearth	$50.00
Patrick	D.	Deem	$250.00
George	A.	Firth	$250.00
Richard	W.	Gallagher	$250.00
David	W.	Goetz	$100.00
Thomas	H.	Gomez	$100.00
Robert	L.	Grzonka	$100.00
Gregory	S.	Hadjis	$150.00
Don	C.	Harrold	$100.00
David	R.	Hess	$100.00
David	E.	Hess	$250.00
Paul	A.	Homer	$150.00
David	E.	Huffman	$150.00
Paul	J.	Jakubec	$100.00
Jeffrey	P.	Kelley	$50.00
Thomas	J.	Kennedy	$250.00
Thomas		Lauderman	$250.00
Delbert	E.	Leatherman	$50.00
Randall	C.	Light	$200.00
Mary	Ellen	Lydon	$250.00
James	E.	Malone	$100.00
Simon		McClure	$100.00
Gary	L.	McCutcheon	$50.00
T.	G.	Medina	$250.00
Thomas	R.	Michel	$150.00
Edward	M.	Mockler	$100.00
Donna	F.	Moore	$100.00
Richard		Oldack	$50.00
Edwin	L.	Phares	$40.00
Stanley	N.	Pickens	$100.00
James	R.	Talarico	$100.00
C.	Thomas	Tallman	$250.00
Janis	P.	White	$250.00
Walter	L.	Williams	$50.00
			$ 5,990.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 10/07/04 Type of Event Roadhouse

Name of Place Held Sleepy Hollow Golf Club

Address of Place Held 3760 Sleepy Hollow Drive, Hurricane, WV 25526

Total Receipts $4,402.00 Total Expenditures $1,256.92

NET RECEIPTS (Subtract total expenditures from total receipts) $3,103.08

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$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	

Subtotal contributions of less than $250.00

OVER $250.00

Date		Amount
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full name Address Contributors job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full name Address Contributors job (Individual only) Where works (Individual only) Affiliation (Political committee only)	
	Full Name Address Contributor's job (Individual only) Where works (Individual only) Affiliation (Political committee only)	

Subtotal contributions of more than $250.00

Subtotal contributions of $250.00 or less

(Enter Total on Page 1, Line 2) TOTAL

MAKE COPIES OF THIS PAGE TO LIST ADDITIONAL CONTRIBUTIONS. ATTACH ADDITIONAL PAGES TO REPORT.

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Putnam Fund Raiser

Phillip	R.	Cooper		100.00
John	R.	Marshall	Jr.	100.00
Betty	J.	Stone		100.00
Raymond	A.	McKinney		100.00
Joseph		Haynes		100.00
James	D.	Bowling	Jr.	100.00
E.	Kent	Hartsog		200.00
Harold	R.	Payne		150.00
James	H.	Caruthers	Jr.	100.00
Thomas	V.	Reisman		200.00
Kenneth		Mulzer		250.00
John	M.H.	Bayliss	Jr.	50.00
Michael	K.	Hendricks		50.00
Paul	G.	Papadopoulos		250.00
Clinton	W.	Sloan		200.00
				2,050.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Putnam County Fundraiser

Gene		Thompson	212 Rockledge Drive	Ribo	WV	25143	Ahern Engineering	Contractor	$	1,000.00
Marcell	B.	Moline	277 Sandwood Road	Hurricane	WV	25526	Self	Physician	$	500.00
Timothy	P	Zell	3018 Brookshire Drive	Hurricane	WV	25526	Nelson Brothers	Operations Mgr.	$	600.00
Penny	R	Young	579 Rocky Step Road	Winfield	WV	25213		Housewife	$	600.00
James		Ahern	500 Silverdale Terrace	Dayton	OH	45440	Ahern Engineering	Contractor	$	1,000.00
Philip	D.	Surface	3 Renard Run	Hurricane	WV	25526	Self	Physician	$	750.00
									$	4,350.00

SCHEDULE 2A

FUND-RAISING EVENTS

EVENT SUMMARY

Date of Event 10/11/04 Type of Event Dinner

Name of Place Held Roane County Committee on Aging

Address of Place Held 811 Madison Avenue, Spencer, WV 25276

Total Receipts $760.00 Total Expenditures -0-

NET RECEIPTS (Subtract total expenditures from total receipts) $760.00

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$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	

Schedule 2A - Fund Raising Events
Benjamin for Supreme Court Committee
Roane County Fund Raiser

Anita	Harold	Ashley	$ 100.00
Walter		Camp	$ 50.00
David		Raines	$ 20.00
Ison		Conley	$ 40.00
George		Callow	$ 50.00
			$ 260.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Campaign
Roane County Fund Raiser

[redacted]	[redacted]	Post Office Box 711	Reedy	WV	25270		Retired	$50.00
								$50.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 10/12/04	**Type of Event** Reception
Name of Place Held Radisson Hotel	
Address of Place Held At Waterfront, Morgantown, WV	
Total Receipts $19,000.00	**Total Expenditures** Not Yet Received
NET RECEIPTS (Subtract total expenditures from total receipts)	

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$250.00 OR LESS

Date	Full Name	Amount
	See Attached Sheets	

Schedule 2A - Fund-Raising Events
Benjamin for Supreme
Morgantown Fund Raiser

Mark R.	Kasselrand		324 W. Run Road	Morgantown	WV	26508	Glenmark	Owner	$	500.00
Brian F.	Thomas		283 Hershenhoe Road	Morgantown	WV	26508	Bruceton Bank	Banker	$	500.00
William	Hennessey		691 Maple Drive	Morgantown	WV	26508	Monongalia Health System	Administrator	$	500.00
David J.	Alvarez		448 Locust Street	Bridgeport	WV	26330	MEC Construction	President	$	500.00
Allison Maule	Stewart		4327 Greatwood Lane	Morgantown	WV	26508	March-Westin	Project Manager	$	1,000.00
Daniel T.	Pochick		302 Briarwood	Bluefield	WV	24605			$	1,000.00
Janet J.	Ehrengruber		770 Stewart St.	Welch	WV	24801	Metcalf Sales	President	$	1,000.00
Kevin L.	Salisbury		1201 Chase Street	Morgantown	WV	26505	March-Westin	CPA	$	1,000.00
Gerald	Beaford		8 Holly Hill	Fairmont	WV	26554			$	1,000.00
James J.	Bryja		4448 Cross Country Drive	Elliott City	MD	21042	Foundation Coal	Senior VP	$	1,000.00
Edward A.	Haffin II		118 Meadow View Lane	Morgantown	WV	26505	Haffin Insurance Agency	Owner	$	1,000.00
William J.	Maloney		3959 Eastlake Drive	Morgantown	WV	26505			$	1,000.00
		Associated Builders & Contractors	Post Office Box 3985	Charleston	WV	25339		PAC	$	1,000.00
		AMVEST Corp.	Post Office Box 5347	Charlottesville	VA	22905		PAC	$	1,000.00
Philip L.	Wieser		873 Tyrone Road	Morgantown	WV	26505	March-Westin	Engineer	$	1,000.00
Dana	Wieser		873 Tyrone Road	Morgantown	WV	26505	March-Westin	Office Manager	$	1,000.00
Robert L.	Burdette		1169 Pineview Drive, Suite G1	Morgantown	WV	26505	State Farm	Insurance Agent	$	500.00
Wayne H.	Stanley		13 Maple Lake	Bridgeport	WV	26330	Stolen Mining	CPA	$	500.00
C. Andrew	Halstead		2308 Lakeside Estates	Morgantown	WV	26508	Self	Physician	$	500.00
		Physicians Alliance For Reform	Post Office Box 1004	Morgantown	WV	26507		PAC	$	500.00
									$	18,300.00

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Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Morgantown Fund Raiser

[redacted]			
Henry	E.	Brown	$ 50.00
Christopher	L.	Callas	$ 250.00
Gretchen	M.	Callas	$ 250.00
L.	Randall	Cober	$ 100.00
Thomas	J.	Dewitt	$ 250.00
Norwood	F.	Duffin	$ 250.00
Nicholas	S.	Grubbs	$ 50.00
Fred		Holyrod	$ 250.00
Kenneth	J.	Juskowich	$ 100.00
James	A.	Olsen	$ 200.00
William	S.	Rice	$ 100.00
F.	Scott	Ratruck	$ 100.00
Jeffrey	R.	Waldo	$ 100.00
Linda		Weber	$ 100.00
Robert		Weser	$ 50.00
Stephen	J.	Wetmore	$ 250.00
Frank	J.	Wood	$ 250.00
			$ 2,700.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event 10/19/04 Type of Event Reception

Name of Place Held Black Knight Country Club

Address of Place Held Beckley, WV

Total Receipts $800.00 Total Expenditures Not Yet Determined

NET RECEIPTS (Subtract total expenditures from total receipts)

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$250.00 OR LESS

Date	Full Name	Amount
	Six Masked Bucks	

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Beckley Fundraiser to be held on October 19, 2004

Tracy	W.	Nylon, II	Post Office Box 1109	Beckley	WV	25802		Retired	$	1,000.00
Joe	D.	Ison	28 Bluefield Lane	Beckley	WV	25801	Tractor Company	Owner	$	1,000.00
Steve		Antoline	313 Middle Cottaton Road	Mount Lookout	WV	26678	Superior Highwall Mining	Owner	$	1,000.00
Gerry	S.	Cushman	120 Daniel Street	Beckley	WV	25801	PhCpa Machinery	Manager	$	750.00
H.	D.	Dent	401 Club Circle Dr	Daniels	WV	25832			$	1,000.00
Ahmed	A.	Khamis	21 Falcon Circle	Beckley	WV	25801	Self	Physician	$	500.00
									$	6,250.00

Schedule 2A - Fund-Raising Events
Benjamin for Supreme Court Committee
Beckley Fundraiser to be held on 10/19/02

Calvin	R.	Kidd	$	250.00
David	R.	Bailey	$	100.00
Robert	R.	Rappold	$	200.00
			$	550.00

SCHEDULE 3A

OTHER INCOME: INTEREST, REFUNDS, MISCELLANEOUS RECEIPTS

(For information, see General Instructions, Page 4.)

Date	Source of Income	Type of Receipt	Amount
		(Enter Total on Page 1, line 4) Total	◇

SCHEDULE 4A

IN-KIND CONTRIBUTIONS

(For information, see General Instructions, Page 4.)

Date	Full name, address, occupation and place where events (if total contributions by individual or committee are more than $250.00)	Description of contribution	Value (amount)
	See Attached Sheets		
MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED		(Enter Total on Page 1, line 7) Total	

Schedule 4A - In-Kind Contributions
Benjamin for Supreme Court Committee

Date	Full name, address, occupation and place where works (If total contributions by individual or committee are more than $250.00	Description of contribution	Value (amount)	
10/8/04	Jennifer Waxman, Route 1, Box 352, Clarksburg, WV 26301 - Student	Invitations, Postage, Printing	$	583.81
10/8/04	Therese A. Waxman	Invitations, Balloons	$	178.13
9/30/04	William Alexander Wade, 153 Meadowridge Townhouse Drive, Morgantown, WV 26505 - Student	Food and Beverages	$	300.00
10/11/04	Douglas Bentz - 100 Geneca Valley Estates, Sissonville, WV 25320 - Administrator, Roane General	Ad, Room Rental, Food	$	473.12
			$	1,838.86

SCHEDULE 1B

LOANS

West Virginia Code: §3-8-5f. Loans to candidates, organizations or persons for election purposes.

"Every candidate, financial agent, person or association of persons or organization advocating or opposing the nomination or election of any candidate or the passage or defeat of any issue or item to be voted upon may not receive any money or any other thing of value toward election expenses except from the candidate, his or her spouse or a lending institution. All loans shall be evidenced by a written agreement executed by the lender, whether the candidate, his or her spouse, or the lending institution. Such agreement shall state the date and amount of the loan, the terms, including interest and repayment schedule, and a description of the collateral, if any, and the full names and addresses of all parties to the agreement. A copy of the agreement shall be filed with the financial statement next required after the loan is executed."

The loan agreement must include all items asked for in the statute. (See above.) The loan agreement does not have to follow a certain format; generally, if all the required information is listed, any format is acceptable.

Candidates or political committees that take out a loan for the campaign through a bank or other commercial lending institution must include a copy of the loan agreement executed with that bank or institution. Candidates should not take out loans which are partially for personal use and partially for the campaign. It is almost impossible to keep reporting straight in this case.

Any money a candidate contributes to his or her campaign committee with the hope of repayment must be treated as a loan and reported in this section. When a candidate determines that no further repayment can be expected, the loan can be reported as repaid in this section by entering the amount left to repay in the repayments column and reporting the same amount as a contribution from the candidate in Schedule 1A. **These loans must be executed in writing. Caution: Candidates may not carry outstanding loans from one campaign to the next. Each campaign is separate. Funds from a current campaign cannot be used to repay a loan from a previous campaign.**

How to report loans

1. Each loan for your campaign should be listed on a **separate** line. (Each time you loan money to the campaign or get a loan, it is a considered to be a **seperate** loan.) Include the following information on the form below:
   a. loan(s) from prior reporting periods and the balance of each loan (Col. A.) If a payment was made on the loan, list that in Col. C. **Any loan that was repaid in previous reporting periods does not have to be listed.**
   b. new loans, the amount (Col. B), any repayments (Col. C), and the balance (Col. D.)
2. Add the amounts of all new loans (Col. B total) and carry that number to the Report Summary, Page 1, Col. A, line 5.
3. Add the amounts of all repayments (Col. C total) and carry the total to the Report Summary, Page 1, Col. A, line 9.
4. Add amounts of outstanding loans (Col. D total) ,and carry the total to the Report Summary, Page 1, Col. A, line 16.
5. **Attach a copy of the loan agreement for each loan received during the reporting period.**

SCHEDULE 1B

LOANS

(A copy of the loan agreement for each loan secured during this filing period must accompany this report)

Bank Loans: List name & address of financial institution Candidate or Candidate's Spouse Loans: List name, residence and mailing address of person(s) making or cosigning loan	Column A Balance of previous loan at end of period Amount	Column B Amount of new loan received during period Date	Amount	Column C Repayments during period Date	Amount	Column D Balance outstanding at end of period Amount
1.						
2.						
3.						
4.						
5.						
(Enter Totals on Report Summary, Page 1.) Totals						

SCHEDULE 2B	ITEMIZED EXPENDITURES (For Information on Expenditures, see General Instructions, Page 5.)		
Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount of expenditure
	See Attached Sheets		

MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED.

(Enter Total of Page 1 line 6) Total

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

Date	Full name, residence address (if a person) or business address (if a business)	Purpose	Amount Expenditure
9/6/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Advertising	$ 37,846.00
9/7/04	Middle Creek Garage, Wheeling, WV 26330	Bus	$ 8,151.80
9/7/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$ 4,800.00
9/7/04	Wal-Mart, Corridor G, South Charleston, WV 25309	Office Equipment	$ 95.12
9/7/04	Allegheny Poster Advertising, Post Office Box 30, Terra Alta, WV 26764	Advertising	$ 770.00
9/7/04	Lamar, P.O. Box 92030, Baton Rouge, LA 70896	Advertising	$ 17,864.00
9/7/04	Steve Cohen, 155 Elm Street, #2, Wheeling, WV 26003	Contract Labor	$ 2,600.00
9/7/04	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Contract Labor	$ 3,320.00
9/7/04	Jason Wanbaugh, 38 W. 7th Avenue, Huntington, Wv 25701	Contract Labor	$ 800.00
9/7/04	Troy Andes, 8 Meadow Ridge Drive Hurricane, WV 25526	Contract Labor	$ 3,320.00
9/7/04	Connie Machel, 149 Timberlake Circle, Scott Depot, WV 25560	Contract Labor	$ 3,000.00
9/7/04	Connie Machel, 149 Timberlake Circle, Scott Depot, WV 25560	Contract Labor	$ 600.00
9/7/04	Key Strategies, 16 Brookline Drive, Charles Town, WV 25414	Campaign Consultant	$ 1,500.00
9/7/04	Color Copy Express, 27720 US Hwy. 119N, Forest Hills, KY 41527	Campaign Buttons	$ 177.00
9/7/04	Admix Broadcast Service, 950 Woodward Drive, Charleston, WV 25312	Advertising	$ 72.00
9/7/04	Hospitality Fare, P.O. Box 40062, Charleston, WV 25364	Charleston Fundraiser	$ 1,450.00
9/7/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Advertising	$ 2,250.00
9/7/04	LJ Art, LLC, 108 Rustic Highlands, Hurricane, WV 25526	Bumper Stickers	$ 291.50
9/8/04	Paris Signs, 2400 5th Street Road, Huntington, WV 25701	Signs	$ 1,900.00
9/10/04	Inter-Mountain, Post Office Box 1339, Elkins, WV 26241	Advertising	$ 121.80
9/10/04	Paris Signs, 2400 5th Street Road, Huntington, WV 25701	Signs	$ 114.00
9/13/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$ 38.35
9/13/04	Charleston Newspapers, Charleston, WV 25301	Reprints	$ 17.00
9/14/04	BB&T, Summers Street, Charleston, WV 25301	Service Fee	$ 5.95

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

9/15/04	GrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Brochures	$	3,479.23
9/16/04	Acordia, Post Office Box 1551, Charleston, WV 25326	Insurance	$	454.80
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	27.30
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	24.20
9/15/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Expenses	$	254.09
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	748.00
9/15/04	FedEx Kinko's, 400 Capital Street, Charleston, WV 25301	Copying	$	20.14
9/15/04	Connie Maichel, 149 Timberlake Circle, Scott Depot, WV 25560	Expenses	$	719.78
9/15/04	Travel Centers of America, Hurricane, WV 25526	Gas, Oil, Antifreeze	$	108.49
9/15/04	West Virginia Executive, 5088 West Washington Street, Suite 310, Cross Lanes,	Reprints	$	780.00
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	5.74
9/15/04	RRAT, Summers Street, Charleston, WV 25301	Merchants Set-Up Fee	$	65.25
9/15/04	Jason Wanbaugh, 38 W. 7th Avenue, Huntington, WV 25701	Expenses	$	882.10
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	13.85
9/15/04	Music Mania, 131 Kanawha Mall, Charleston, WV 25386	Mic Stand	$	42.39
9/15/04	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Expenses	$	698.10
9/15/04	Bill Kiernan, 3450 Elk Avenue, Shady Side, OH 43947	Contract Labor	$	100.00
9/15/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	23.56
9/16/04	Office Max, Corridor G, South Charleston, WV 25309	Office Supplies	$	116.88
9/16/04	Bill Kiernan, 3450 Elk Avenue, Shady Side, OH 43947	Contract Labor	$	160.00
9/16/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	740.00
9/16/04	Wal-Mart, Corridor G, South Charleston, WV 25309	Reprint/me	$	25.56
9/17/03	United Parcel Service 3100 MacCorkle Avenue, SW, South Charleston WV 25303	Shipping	$	26.93
9/17/04	Western Branch Diesel, Inc., Charleston Ordnance Center, South Charleston, WV	Bus Maintenance	$	994.41
9/17/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	6,000.00
9/17/04	Kinko's Capitol Street, Charleston, WV 25301	Copying	$	20.14

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

9/21/04	BB&T, Summers Street, Charleston, WV 25301	Analysis Service Charge	$	178.20
9/21/04	Holiday Inn, Charleston House, Charleston, WV 25301	Lodging	$	404.38
9/22/04	Screen Graphics, P.O. Box 585, Nitro, WV 25143	Signs	$	687.10
9/23/04	Sam's Club - Corridor G, South Charleston, WV 25303	Office Supplies	$	151.58
9/22/04	Terry Driggs, 1017 Oakwood Road, Culloden, WV 25510	Truck Usage	$	50.00
9/22/04	Terry Driggs, 1017 Oakwood Road, Culloden, WV 25510	Truck Usage	$	10.00
9/23/04	Kinko's- Capitol Street, Charleston, WV 25301	Copying	$	47.49
9/23/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	6.85
9/23/04	Aldrich Business Forms, Post Office Box 260, Charleston, WV 25321	Office Supplies	$	8.32
9/23/04	Bill Kleman, 3450 Elk Avenue, Shady Side, OH 43947	Contract Labor	$	2,320.00
9/24/04	Staples - Corridor G - South Charleston, WV 25303	Office Supplies	$	80.02
9/24/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	12.90
9/27/04	Office Depot, Huntington, WV 25177	Office Supplies	$	31.79
9/25/04	Kinko's- Capitol Street, Charleston, WV 25301	Copying	$	71.66
9/25/04	Office Max, Corridor G, South Charleston, WV 25309	Office Supplies	$	6.99
9/28/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	7.70
9/28/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 218, Pittsburgh PA	Advertising	$	122,000.00
9/28/04	Terry Driggs, 1017 Oakwood Road, Culloden, WV 25510	Truck Usage	$	100.00
9/30/04	City of Charleston, P.O. Box 2749, Charleston, WV 25330	Parking	$	160.00
10/1/04	Lowe's, Corridor G, South Charleston, WV 25303	Fence	$	159.11
10/1/04	Exxon Mobile - Charleston, WV 25312	Gas	$	10.00
10/1/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	222.00
10/1/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	17.60
10/1/04	Staples - Nitro Market Place, Cross Lanes, WV	Office Supplies	$	15.77
10/1/04	West Virginians for Life, 427 Spruce Street, Morgantown, WV 26505	Lunch	$	50.00
10/1/04	Steve Cohen, 156 Elm Street, #2, Wheeling, WV 26003	Expenses	$	1,372.69

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

10/1/04	Steve Cohen, 158 Elm Street, #2, Wheeling, WV 26003	Contract Labor	$	6,500.00
10/1/04	Connie Machel, 149 Timberlake Circle, Scott Depot, WV 25560	Contract Labor	$	3,600.00
10/1/04	Connie Machel, 149 Timberlake Circle, Scott Depot, WV 25560	Contribution Cards	$	116.00
10/1/04	Jason Wambaugh, 38 W. 7th Avenue, Huntington, WV 25701	Contract Labor	$	1,500.00
10/1/04	Sara Galea, 15004 Hilltop Drive, Fort Ashby, WV 26719	Contract Labor	$	500.00
10/1/04	Key Strategies, 18 Brookline Drive, Charles Town, WV 25414	Campaign Services	$	1,500.00
10/1/04	Connie Machel, 149 Timberlake Circle, Scott Depot, WV 25560	Expenses	$	110.44
10/1/04	Troy Andes, 8 Meadow Ridge Drive, Hurricane, WV 25526	Contract Labor	$	3,320.00
10/1/04	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Contract Labor	$	3,320.00
10/1/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Campaign Consultant	$	4,800.00
10/4/04	Screen Graphics, P.O. Box 665, Nitro, WV 25143	Signs	$	1,627.10
10/4/04	Independence Air, Yeager Airport, Charleston, WV 25302	Travel	$	98.20
10/4/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Advertising	$	2,250.00
10/4/04	LJ Art, LLC, 108 Rustic Highlands, Hurricane, WV 25526	Stickers	$	1,017.60
10/4/04	LJ Art, LLC, 108 Rustic Highlands, Hurricane, WV 25526	Shirts	$	182.00
10/4/04	Aldrich Business Forms, Post Office Box 269, Charleston, WV 25321	Office Supplies	$	799.18
10/4/04	PRO Print Professional Printers, 1019 Quarrier Street, Charleston, WV 25301	Lapel Tags	$	169.00
10/4/04	Terry Driggs, 1017 Oakwood Road, Culloden, WV 25510	Truck Usage	$	100.00
10/4/04	Admix Broadcast Service, 980 Woodward Drive, Charleston, WV 25312	Tapes	$	1,061.08
10/5/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	7.35
10/5/04	The Mail Room - 3959 Teays Valley Road, Hurricane, WV 25526	Contribution Cards	$	310.06
10/6/04	Terry Driggs, 1017 Oakwood Road, Culloden, WV 25510	Truck Usage	$	50.00
10/6/04	Freiarouth Printing, Inc., 2193 National Road, Wheeling, WV 26003	Stationery	$	609.34
10/7/04	PLYLCOM - Knoxville, TN	Computer Parts	$	98.20
10/8/04	Brentwood Associates, 300 Main Avenue, Suite 300, Wheeling, WV 26003	Reimbursement for Advertising	$	28,605.00
10/8/04	Sleepy Hollow Golf Club, 3780 Sleepy Hollow Drive, Hurricane, WV 25526	Fundraiser	$	721.83

BEST AVAILABLE COPY

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

10/5/04	Hampton Inns, Morgantown, WV	Lodging	$	184.24
10/11/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Advertising	$	45,000.00
10/8/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	187.21
10/8/04	United Parcel Service, 3100 MacCorkle Avenue, SW, South Charleston, WV 25303	Shipping	$	11.65
10/12/04	Pamela R. Hasheim, 65 East State Street, Suite 1000, Columbus, Ohio 43212	Expenses	$	883.32
10/12/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	298.00
10/12/04	3 B Tech Computers -	Computer Parts	$	87.08
10/12/04	Terry Driggs, 1017 Oshwood Road, Culloden, WV 25510	Truck Usage	$	100.00
10/13/04	United States Post Office, Lee Street, Charleston, WV 25301	Postage	$	30.63
10/13/04	Richardson Printing Corporation, Box 663, Marietta, OH 45750	Posters	$	1,004.00
10/13/04	Thunder Associates	Advertising	$	1,116.00
10/14/04	FLYI COM - Knoxville, TN	Computer Parts	$	87.00
10/14/04	BB&T, Summers Street, Charleston, WV 25301	Service Fee	$	5.95
10/14/04	Kinko's- Capitol Street, Charleston, WV 25301	Copying	$	71.58
10/14/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Advertising	$	24,098.00
10/14/04	BrabenderCox, 100 W. Station Square Drive, Landmarks Building, Suite 215, Pittsburgh PA	Brochures	$	3,479.23
10/15/04	BB&T, Summers Street, Charleston, WV 25301	Merchant Fee	$	20.00
	Total		$	370,658.52

SCHEDULE 3B

UNPAID BILLS

(For Information, see General Instructions, Page 5.)

Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount
	See Attached Sheet		

(Enter Total on Page 1, Line 11) **Total**

OATH OR AFFIRMATION

I, Lora K. Abernathy, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement.

Lora K. Abernathy
Signature of Candidate, Financial Agent or Treasurer

Date 10/25, 2004

Office Use Only

RECEIVED

OCT 26 2004

WV STATE

Schedule 3B

Unpaid Bills
Benjamin for Supreme Court Committee

Date	Full Name, Address	Purpose	Amount	
10/8/08	Oliverio's - 507 E. Main Street, Bridgeport, WV 26330	Catering	$	1,174.50
10/9/08	Capitol Conference Center, Post Office Box 3740, Charleston, WV 25337	Press Conference	$	75.00
10/8/04	Encor Media Network, Inc., 92 16th Street, Wheeling, WV 26003	Recording	$	158.00
			$	1,408.50

STATE OF WEST VIRGINIA
CAMPAIGN FINANCIAL STATEMENT (LONG FORM)
IN RELATION TO 2004 ELECTION YEAR

For political committees, list the current election year. For candidates, list the current campaign or the year of an open past campaign.
Supply all information requested. It is required by WV Code §3-8-5a.

Benjamin for Supreme Court Committee	Nadine Goff, Treasurer
Candidate or Committee Name Republican	Candidate or Committee's Treasurer P.O. Box 1869
Political Party (for candidates) Justice of the WVSCA	Treasurer's Mailing Address (Street, Route or P.O. Box) Charleston, WV 25327 304-743-7169
Office Sought (for candidates) District/Division	City, State, Zip Code Daytime Phone #

Reporting Period (check one)

☒ **Annual Report 2005 Calendar Year**
(Due last Saturday in March or within 6 days thereafter. This report filed for old campaigns or year following most recent election)

☐ **First General Report**
(Due first Saturday in September or within 6 days thereafter)

☐ ***Amended Report*** *(check if applicable)*
You must also check one box of appropriate reporting period

☐ **First Primary**
(Due last Saturday in March or within 6 days thereafter. This is the first report for current election year reporting)

☐ **Pre-general Report**
(Due 10 to 17 days before general or special election)

☐ **Pre-primary Report**
(Due 10 to 17 days before primary election)

☐ **Post-general Report**
(Due 25 to 31 days after general or special election)

☐ **Post-primary Report**
(Due 25 to 31 days after primary election)

☐ **Final Report**
(Zero balance required. PAC must also file Form Forn F-6 Dissolution)

* *post general may also be final report if "0" balance*

REPORT TOTALS

Fill in totals after you complete pages for contributions, fundraisers, other income, in-kind contributions, loans, expenditures, unpaid bills.

CONTRIBUTIONS OF MONEY	**Totals for this Period**
1. Contributions – Schedule 1A	46,360.00
2. Fund-raising Events – Schedule 2A	0
3. **TOTAL CONTRIBUTIONS** (add lines 1 and 2)	46,360.00
4. Other Income – Schedule 3A	0
5. Loans received – Schedule 1B	0
6. **TOTAL OTHER INCOME** – (Add lines 4 and 5)	0
7. In-kind (non-cash) contributions – Schedule 4A	0

EXPENDITURES

8. Itemized Expenditures – Schedule 2B	46,386.16
9. Loan Repayent – Schedule 1B	12,000.00
10. **TOTAL**	

EXPENDITURES (add lines 8 and 9)	58,986.18

OUTSTANDING LOANS/DEBTS

11. Unpaid Bills - Schedule 3B	13,788.35
12. Outstanding Loans – Schedule 1B	4250.00
13. **TOTAL DEBTS** – (Add lines 11 and 12)	18,038.35

CASH BALANCE SUMMARY

A. Beginning Balance (ending balance from previous report)	15,363.00
B. Total Receipts (Add lines 3 & 6	46,360.00
C. Subtotal (Add lines A & B)	61,723.00
D. Total Expenditures (Line 10)	58,986.18
E. Ending Balance (Subtract line D from line C)	2,736.87

**Cannot be negative balance*

TOTAL RECEIPTS
ELECTION YER-TO-DATE
(Add line B from all Reports)

845,504.02

TOTAL EXPENDITURES
ELECTION YEAR-TO-DATE
(Add line D from all Reports)

828,663.60

Official Form F-7
Revised 7/03

Issued by the WV State Election Commission
(WV Code §3-8-5)

SCHEDULE 1A

CONTRIBUTIONS
$250.00 OR LESS

(For information about contributions, see General Instructions, Page 3.)

DATE	CONTRIBUTOR'S FULL NAME OR COMMITTEE'S NAME	AMOUNT
	See Attached Sheet	

MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED

Subtotal contributions of $250.00 or less

Schedule 1A

Contributions
$250.00 or Less
Benjamin for Supreme Court Campaign

Date	First Name	Middle Nam	Last Name	Suffix	Contribution
12/6/2004	William	H.	Scharf		$100.00
12/6/2004	David	A.	Santrock		$100.00
12/6/2004	Gregory	A.	Doyle		$10.00
12/6/2004	James	D.	Feisen		$50.00
12/6/2004	Donald	H.	Moore		$50.00
12/6/2004	Satyanarayana	M.	Mamidi		$25.00
12/6/2004	Desingu	S.	Raja		$250.00
12/6/2004	John	S.	Moore		$100.00
12/6/2004	A	J.	Magee		$25.00
12/6/2004	John	J.	Battaglino	Jr.	$100.00
12/6/2004	Charles	R.	McElwee		$250.00
12/6/2004	Kyle	R.	Hegg		$100.00
12/6/2004	Ronald	C.	Stone		$250.00
12/6/2004	Michael	S.	Walker		$250.00
12/6/2004	W.	Martin	Riggs		$200.00
12/6/2004	Douglas	C.	McElwee		$100.00
12/6/2004	P.	Scott	Icard		$100.00
12/6/2004	L.	D.	Emerson		$50.00
12/6/2004	Sallie	F.	McClaugherty		$200.00
12/6/2004	John	N.	Charnock	Jr.	$100.00
12/6/2004	L.	Gray	Marion	Jr.	$250.00
12/6/2004	Priscilla	M.	Haden		$100.00
12/6/2004	William	J.	Charnock		$100.00
12/6/2004	Connie		Long		$50.00
12/6/2004	David		Durbin		$100.00
12/6/2004	Paul	G.	Papadopoulos		$150.00
12/6/2004	Floyd	M.	Sayre	Jr.	$100.00
1/11/2005	Kim	Brown	Poland		$100.00
3/3/2005	Charles	L.	Rosen		$250.00
3/3/2005	Warren	W.	Boling		$250.00
					$3,660.00

SCHEDULE 1A	CONTRIBUTIONS OVER $250.00 *(For information about contributions, see General Instructions, Page 3.)*	
DATE	INDIVIDUAL CONTRIBUTOR OR COMMITTEE'S NAME *By law, you must report an individual contributor's occupation and business affiliation. For a committee, you must report the affiliation (the group, association, corporation, or union with which it is connected.)*	AMOUNT
	Full Name: See Attached Sheets Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
	Full Name: Address: Contributor's job: (individual contributor only) Where contributor works: (individual contributor only) Affiliation: (political committee only)	
		Subtotal contributions of more than $250.00
MAKE AS MANY COPIES OF THIS PAGE AS YOU NEED		Subtotal contributions of $250.00 or less
		Enter Total on Page 1, line 11 Total

Schedule 1A

Contributions Over $250.00
Benjamin for Supreme Court Campaign

Date	Prefix	First Name	Middle Init	Last Name	Address	City	State	Postal Code	Employer	Occupation	Contribution
12/8/2004	Dr	Richard	C	Geary	1939 Market Street	Wheeling	WV	26003	Self	Physician	$500.00
12/8/2004	Dr	George	E	Wilson	P.O. Box 1111	Charleston	WV	25324	Mountaineer Imaging	Physician	$500.00
12/8/2004	Dr	Thomas	J	Zekan	P.O. Box 1111	Charleston	WV	25324	Mountaineer Imaging	Physician	$500.00
12/8/2004	Dr	Gerit	A	Kimmey	15 Kensington Lane	Huntington	WV	25705	Self	Physician	$500.00
12/8/2004	Mr	Daniel		Stalker	101 Whispering Woods Road	Charleston	WV	25304	Self	Attorney	$1,000.00
12/8/2004	Dr	Robert	A	Caverley	305 Boone and Hedges Rd.	Wheeling	WV	26003	Self	Physician	$400.00
12/8/2004	Mr	Paul		White	Post Office Box 129	Cabin Creek	WV	25035	Paul White Real Estate	Owner	$500.00
12/8/2004	Mr	Charles	S	Morton	1405 Sweetbriar Road	Charleston	WV	25314	City Insurance	Agent	$300.00
1/6/2005	Mr	Lee		Snyder	270 Industrial Boulevard	Kearneysville	WV	25430	Snyder Environmental	Owner	$500.00
3/3/2005	Mr	Robert	J	Coury	2900 English Turn Drive	Presto	PA	15142	Mylan Laboratories	VP & CEO	$1,000.00
3/3/2005	Dr	Charlotte	L	Dille	2288 Lakeside Estates	Morgantown	WV	26508	University Health Associates	Physician	$1,000.00
3/3/2005	Mr	Douglas	J	Leech	Post Office Box 506	Morgantown	WV	26507	Centra Bank	Banker	$1,000.00
3/3/2005	Dr	Larry	V	Carson	584 Patterson Drive	Morgantown	WV	26505	Centra Bank	Banker	$500.00
3/3/2005	Mr	E.	Richard	Hilleary	738 Courtney Avenue	Morgantown	WV	26501	Centra Bank	Banker	$1,000.00
3/3/2005	Ms	Patty		Thorne	1139 Munsey Street	Morgantown	WV	26505	Howard Hanna	Realtor	$1,000.00
3/3/2005	Mr	Milan		Puskar	Post Office Box 4310	Morgantown	WV	26505	Mylan Laboratories	Owner	$1,000.00
3/3/2005	Ms	Elaine	M.	D'Alessandri	798 Poplar Woods Drive	Morgantown	WV	26505	Clayworks	Self-employed	$1,000.00
3/3/2005	Ms	Rosemarie		Coury	2900 English Turn Drive	Presto	PA	15142		Homemaker	$1,000.00
3/3/2005	Mr	Randall	L	Williams	1845 Hallack Road	Morgantown	WV	26508	Centra Bank	Banker	$1,000.00
3/3/2005	Ms	Ginger		Lorenze	735A Chestnut Ridge Road	Morgantown	WV	26505		Housewife	$1,000.00
3/3/2005	Mr	Steve		Lorenze	735A Chestnut Ridge Road	Morgantown	WV	26506	Platinum Properties	Owner	$1,000.00
3/3/2005	Mr	Jerry	A	Lorenze	2011 Iaeger Ferry Drive	Morgantown	WV	26508	Suburban Lanes	President	$1,000.00
3/3/2005	Dr	John		Collins	4759 Ridgetop Drive	Morgantown	WV	26508	University Health Associates	Physician	$300.00
3/3/2005	Ms	Colleen	S.	Bailes	4135 Cove Point Drive	Morgantown	WV	26508		Homemaker	$700.00
3/3/2005	Dr	Dennis		Burton	126 Stone Brook Estates	Morgantown	WV	26508	Amerlad Inc.	Physician	$1,000.00
3/3/2005	Mr	John	T	Fahey	3008 Fallen Oak Road	Morgantown	WV	26508	Centra Bank	Banker	$1,000.00
3/3/2005	Mr	Timothy	P.	Raab	887 Riverview Drive	Morgantown	WV	26506	Centra Bank	Banker	$1,000.00
3/3/2005	Mr	Bruce	B	McClymonds	1431 Mayfield Road	Masontown	WV	26542	Ruby Hospital	President	$1,000.00
3/3/2005	Mr	Mark	A	Heckney	10 Onoa Way	Morgantown	WV	26508	Amerlad Inc.	Physician	$1,000.00
3/3/2005	Dr	Mathis	P	Frick	Post Office Box 380	Reedsville	WV	26547	University Health Associates	Physician	$500.00
3/3/2005	Dr	Michael	B	Felton	Route 1, Box 184	Independence	WV	25374	Amerlad, Inc.	Physician	$500.00
3/3/2005	Dr	D. Keith		Mullens	5 Summit Overlook Drive	Morgantown	WV	26508	University Health Associates	Physician	$1,000.00
3/3/2005	Dr	Julian	F	Bailes	4135 Cove Point Drive	Morgantown	WV	26508	University Health Associates	Physician	$1,000.00
3/3/2005	Mr	J. Thomas		Jones	3108 N. Greystone Drive	Morgantown	WV	26508	WV United Hospital	CEO	$1,000.00
3/3/2005	Mr	Bruce	C	Carter	338 New Street	Ridgeport	WV	26330	United Hospital	President	$1,000.00
3/3/2005	Mr	Francis	R	Vitale	2062 Pinecrest Drive	Morgantown	WV	26505	Centra Bank	Banker	$1,000.00
											$29,400.00

Schedule 1A

Contributions Over $250.00
Benjamin for Supreme Court Campaign
Donations to Retire Primary Debt

Prefix	First Name	Last Name	Organization Name	Address	City	State	Postal Code	Date	Employer	Occupation	Contribution
			Arch Coal, Inc.	One City Place Drive	St. Louis	MO	63141-	12/6/2004		PAC	$1,000.00
			WV Car	Post Office Box 8036	Charleston	WV	25327-	12/6/2004		PAC	$1,000.00
			West Virginians for Coal	Post Office Box 822	Charleston	WV	25323-	12/6/2004		PAC	$1,000.00
			WV EPAC	P.O. Box 4108	Charleston	WV	25364-	12/6/2004		PAC	$1,000.00
Dr	Michael D.	Fuller		1561 Clark Road	Charleston	WV	25314-	12/6/2004	Bone & Joint Surgeons	Physician	$500.00
Mr	Kevin	Lorentz		738A Chestnut Ridge Road	Morgantown	WV	26505-	3/3/2005	Platinum Properties	Owner	$1,000.00
Mr	Ginger	Lorentz		738A Chestnut Ridge Road	Morgantown	WV	26505-	3/3/2005		Housewife	$1,000.00
Mr	Robert J.	Coury		2000 English Turn Drive	Presto	PA	15143-	3/3/2005	VP & CEO	Mylan Laboratories	$1,000.00
Mrs	Rosemarie	Coury		2000 English Turn Drive	Presto	PA	15143-	3/3/2005		Housewife	$1,000.00
Mr	Jerry A.	Lorentz		2011 Lee Ferry Drive	Morgantown	WV	26508-	3/3/2005	Sutcliffe Lanes	President	$1,000.00
Mr	Allen	Fuller		Post Office Box 4313	Morgantown	WV	26503-	3/3/2005	Mylan Laboratories	Owner	$1,000.00
Mrs	Polly	Charlie		1110 Mulberry Street	Morgantown	WV	26505-	3/3/2005	Howard Hannah	Realtor	$1,000.00
Dr	Dennis M.	Burton		126 Stone Brook Estates	Morgantown	WV	26508-	3/3/2005	Amerlad, Inc.	Physician	$1,000.00
Mr	Leo A.	Vecellio, Jr.		213 Via Del Mar	Palm Beach	FL	33480-	1/7/2005	Vecellio & Grogan	Retiree	$1,000.00
											$18,500.00

SCHEDULE 2A **FUND-RAISING EVENTS**

EVENT SUMMARY

Date of Event N/A Type of Event

Name of Place Held

Address of Place Held

Total Receipts Total Expenditures

NET RECEIPTS (Subtract total expenditures from total receipts)

WARNING: ALL monies received by fundraisers must be reported under Schedule 2A, regardless of the type of fundraiser. If contributors and amounts are not listed, WV Code §3-8-5a requires that the money be turned over to the West Virginia General Revenue Fund. The only exception to this is detailed in West Virginia Code §3-8-5a *and applies only to political party committees. (For additional information, see General Instructions, Page 4.)*

$250.00 OR LESS

Date	Full Name	Amount

SCHEDULE 3A

OTHER INCOME: INTEREST, REFUNDS, MISCELLANEOUS RECEIPTS

(For information, see General Instructions, Page 4.)

Date	Source of Income	Type of Receipt	Amount
	N/A		
		(Enter Total on Page 1, line 4) Total	

SCHEDULE 4A

IN-KIND CONTRIBUTIONS

(For information, see General Instructions, Page 4.)

Date	Full name, address, occupation and place where works (if total contributions by individual or committee are more than $250.00)	Description of contribution	Value (amount)
	N/A		
		(Enter Total on Page 1, line 7) Total	

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SCHEDULE 1B

LOANS

West Virginia Code: §3-8-5f. Loans to candidates, organizations or persons for election purposes.

"Every candidate, financial agent, person or association of persons or organization advocating or opposing the nomination or election of any candidate or the passage or defeat of any issue or item to be voted upon may not receive any money or any other thing of value toward election expenses except from the candidate, his or her spouse or a lending institution. All loans shall be evidenced by a written agreement executed by the lender, whether the candidate, his or her spouse, or the lending institution. Such agreement shall state the date and amount of the loan, the terms, including interest and repayment schedule, and a description of the collateral, if any, and the full names and addresses of all parties to the agreement. A copy of the agreement shall be filed with the financial statement next required after the loan is executed."

The loan agreement must include all items asked for in the statute. (See above.) The loan agreement does not have to follow a certain format; generally, if all the required information is listed, any format is acceptable.

Candidates or political committees that take out a loan for the campaign through a bank or other commercial lending institution must include a copy of the loan agreement executed with that bank or institution. Candidates should not take out loans which are partially for personal use and partially for the campaign. It is almost impossible to keep reporting straight in this case.

Any money a candidate contributes to his or her campaign committee with the hope of repayment must be treated as a loan and reported in this section. When a candidate determines that no further repayment can be expected, the loan can be reported as repaid in this section by entering the amount left to repay in the repayments column and reporting the same amount as a contribution from the candidate in Schedule 1A. **These loans must be executed in writing. Caution: Candidates may not carry outstanding loans from one campaign to the next. Each campaign is separate. Funds from a current campaign cannot be used to repay a loan from a previous campaign.**

How to report loans

1. Each loan for your campaign should be listed on a separate line. (Each time you loan money to the campaign or get a loan, it is a considered to be a separate loan.) Include the following information on the form below:
   a. loan(s) from prior reporting periods and the balance of each loan (Col. A.) If a payment was made on the loan, list that in Col. C. **Any loan that was repaid in previous reporting periods does not have to be listed.**
   b. new loans, the amount (Col. B), any repayments (Col. C), and the balance (Col. D.)
2. Add the amounts of all new loans (Col. B total) and carry that number to the Report Summary, Page 1, Col. A, line 5.
3. Add the amounts of all repayments (Col. C total) and carry the total to the Report Summary, Page 1, Col. A, line 9.
4. Add amounts of outstanding loans (Col. D total) ,and carry the total to the Report Summary, Page 1, Col. A, line 18.
5. **Attach a copy of the loan agreement for each loan received during the reporting period.**

SCHEDULE 1B

LOANS

(A copy of the loan agreement for each loan secured during this filing period must accompany this report)

Bank Loans: List name & address of financial institution Candidate or Candidate's Spouse Loans: List name, residence and mailing address of person(s) making or cosigning loan	Column A Balance of previous loan at end of period	Column B Amount of new loan received during period		Column C Repayments during period		Column D Balance outstanding at end of period
	Amount	Date	Amount	Date	Amount	Amount
1. Brent Bonjanus 1807 Huber Road Charleston, WV 25314	16,250.00		0	12/13/04	12,000.00	4,250.00
2.						
3.						
4.						
5.						
(Enter Totals on Report Summary, Page 1.) Totals		16,250.00		0		4,250.00

SCHEDULE 2B	ITEMIZED EXPENDITURES (For information on Expenditures, see General Instructions, Page 5.)		
Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount of expenditure
	See Attached Sheets		

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(Enter Total on Page 1, line 9) Total

Schedule 2B Itemized Expenditures
Benjamin for Supreme Court Campaign

Date	Full name, residence address (If a person) or business address (if a business)	Purpose	Amount Expenditure
11/30/2004	Dick Stockton, 242 E. Park St, Westerville, OH 43081	Research	$ 250.00
12/2/2004	Fritz Aid, Charleston, WV	Reception	$ 448.84
12/3/2004	Dick Stockton, 242 E. Park St, Westerville, OH 43081	Research	$ 250.00
12/7/2004	Embassy Suites, Charleston, WV 25301	Lodging	$ 155.85
12/8/2004	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Contract Labor	$ 2,500.00
12/8/2004	Jason Wanbaugh, 38 W 7th Avenue, Huntington, WV 25701	Contract Labor	$ 1,500.00
12/8/2004	Connie Machel, 149 Timberline Circle, Scott Depot, WV 25560	Contract Labor	$ 2,500.00
12/8/2004	Steve Cohen, 155 Elm Street, #2, Wheeling, WV 26003	Contract Labor	$ 2,500.00
12/14/2004	BB&T Summers Street, Charleston, WV 25301	Service Fee	$ 5.95
12/15/2004	BB&T Summers Street, Charleston, WV 25301	Merchant Fee	$ 414.48
12/26/2005	University of Charleston	Reception	$ 2,578.14
1/14/2005	BB&T Summers Street, Charleston, WV 25301	Service Fee	$ 5.95
1/21/2004	BB&T Summers Street, Charleston, WV 25301	Analysis Fee	$ 12.00
2/14/2004	BB&T Summers Street, Charleston, WV 25301	Service Fee	$ 5.95
2/22/2004	BB&T Summers Street, Charleston, WV 25301	Analysis Fee	$ 3.00
3/2/2005	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Success Bonus	$ 2,500.00
3/2/2005	Jeremy Maynard, 373 A Street, Ceredo, WV 25507	Success Bonus	$ 2,500.00
3/2/2005	Brentwood Associates, Wheeling, WV	Balance November	$ 7,800.00
3/2/2005	Robin Capehart, Brentwood Drive, Wheeling, WV	Success Bonus	$ 10,000.00
3/2/2005	Steve Cohen, 155 Elm Street, #2, Wheeling, WV 26003	Success Bonus	$ 7,500.00
3/2/2005	Nadine Goff, 1019 Oakwood Road, Culloden, WV 25510	Contract Labor	$ 2,250.00
3/3/2005	The Greenbrier, White Sulphur Springs, WV	Reception	$ 897.47
3/14/2005	BB&T Summers Street, Charleston, WV 25301	Service Fee	$5.95
3/21/2004	BB&T Summers Street, Charleston, WV 25301	Analysis Fee	$3.00
			$ 46,388.18

SCHEDULE 3B

UNPAID BILLS

(For information, see General Instructions, Page 5.)

Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount
	See Attached Sheets		

(Enter Total on Page 1, Line 11) Total

OATH OR AFFIRMATION

I, Nadine Goff, swear or affirm that the attached statement is true and correct, to the best of my knowledge, for all financial transactions occurring within the period covered by this statement.

Nadine Goff
Signature of Candidate, Financial Agent or Treasurer

Date March 31, 2005

Office Use Only

RECEIVED
05 MAR 31 AM 11:37
OFFICE OF SECRETARY OF STATE
SACRAMENTO, CALIFORNIA

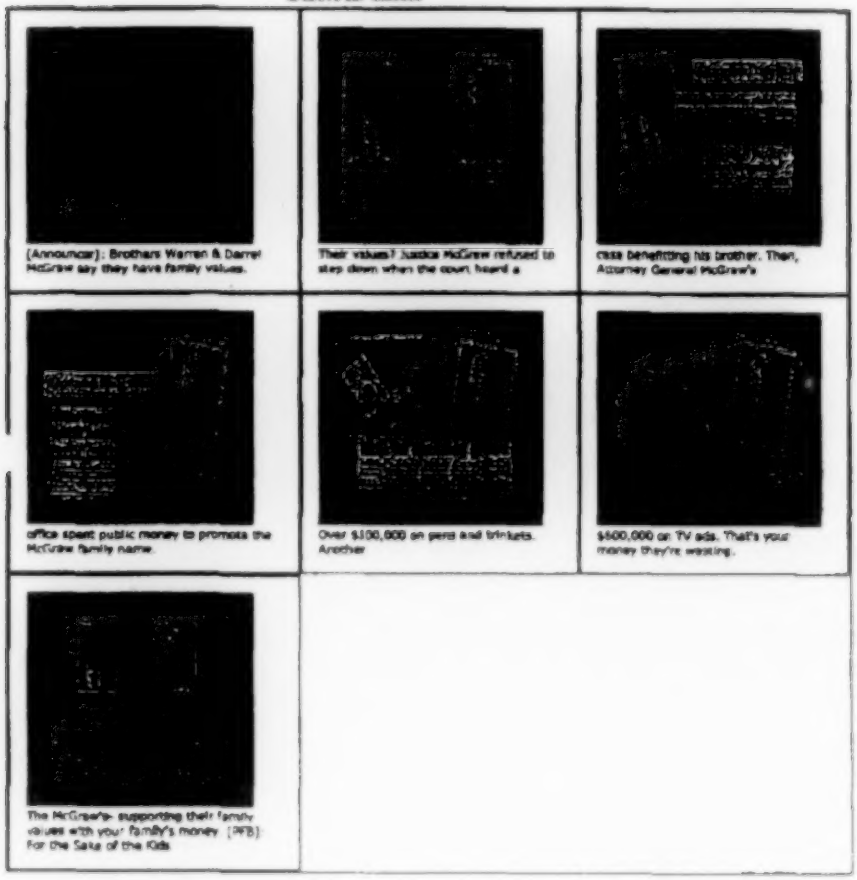
Schedule 3B

Unpaid Bills
Benjamin for Supreme Court Committee

Date	Full name, residence address (if a person) or business address (if a firm)	Purpose	Amount
9/1/2004	Artaxide International, Inc. 205 Pennsylvania Avenue, SE, Washington, DC 20003	Software	$ 1,500.00
9/1/2004	Key Strategies, 18 Brookline Drive, Charles Town, WV 25314	Consulting Services	$ 1,500.00
11/19/2004	JSI Presort Mailing Services, 725 Walts Street, Charleston, WV 25302	Mailing Services	$ 868.35
11/26/2004	Cohen and Company, 158 Elm Street, #2, Wheeling, WV 26003	Consulting Services	$ 2,500.00
11/26/2004	Jason Wanbaugh, 38 W. 7th Avenue, Huntington, WV 25701	Consulting Services	$ 3,500.00
11/26/2004	Nadine Goff, 1019 Oakwood Road, Cuttoden, WV 25510	Consulting Services	$ 2,250.00
11/1/2004	Prettyman Broadcasting, 1826 W. King Street, Martinsburg, WV 25401	Advertising	$ 1,872.00
			$ 13,788.35

STSUPCT/WV SOTK BROTHERS MCGRAW

Brand: AMD FOR/SAKE/KIDS ORG (8329)
Parent: PARENT UNKNOWN
Aired: 09/21/2004 - 09/21/2004
Creative Id: 3561890



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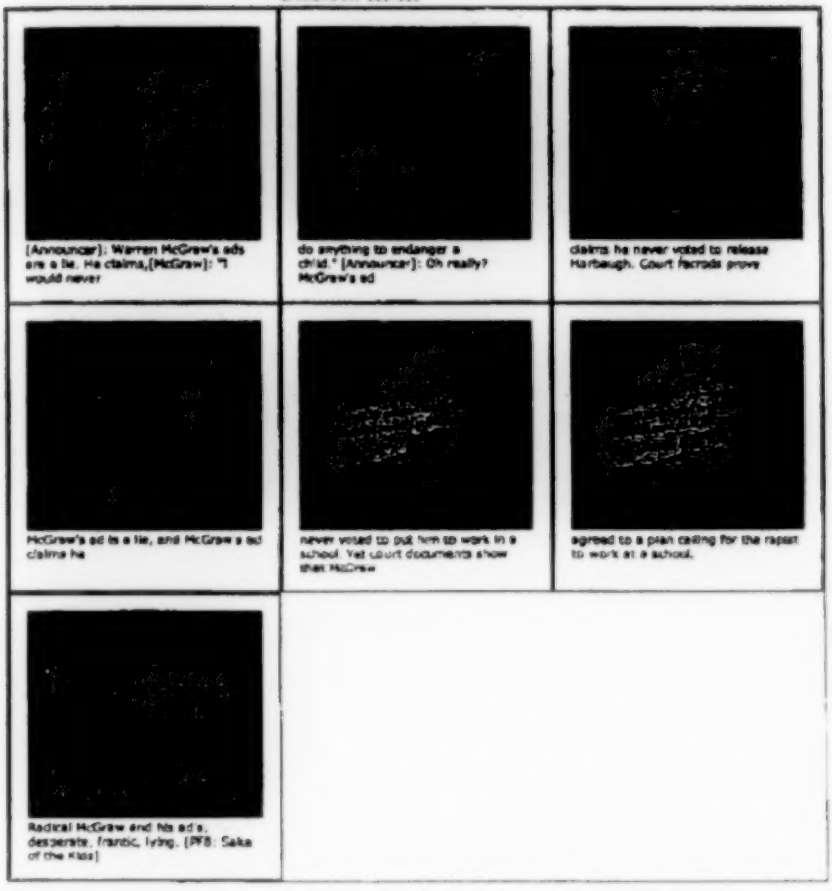
1-866-559-CMAG

STSUPCT/WV SOTK MCGRAW ADS A LIE

Brand: POL-SUPREME COURT (B333)
Parent: POLITICAL ADV
Aired: 10/23/2004 - 10/24/2004
Creative Id: 3604569



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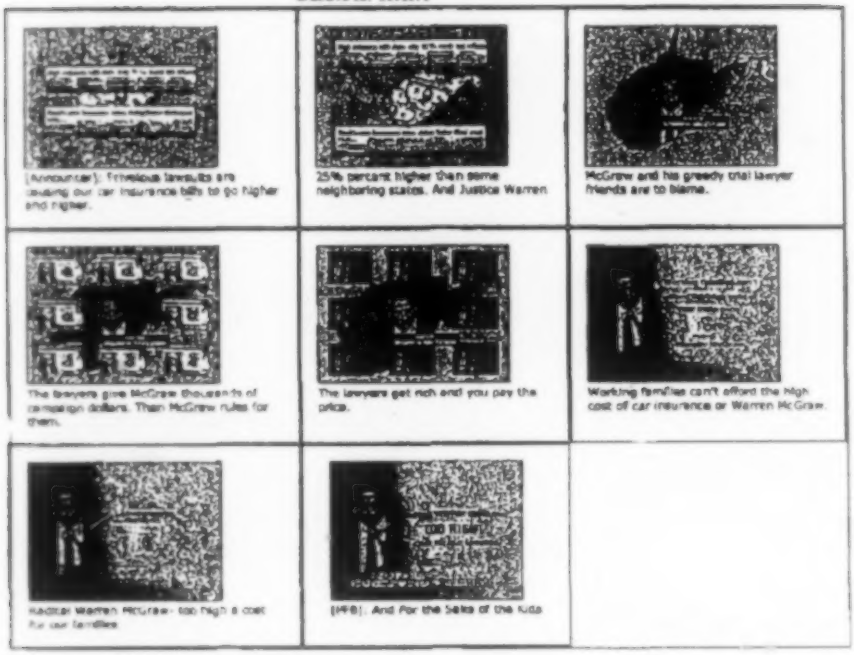
STSUPCT/WV SOTK MCGRAW CAR INSURANCE

Brand: POL-SUPREME COURT (8333)
Parent: POLITICAL ADV
Aired: 10/10/2004 - 10/17/2004
Creative Id: 3596975



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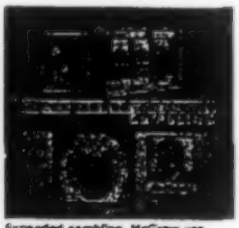
STSUPCT/WV SOTK MCGRAW CLEAR DIFFERENCES

Brand: POL-SUPREME COURT (8333)
Parent: POLITICAL ADV
Aired: 10/28/2004 - 10/30/2004
Creative Id: 3611588

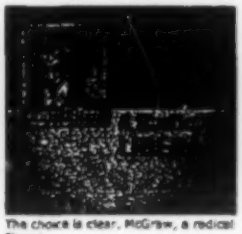
[Announcer]: Warren Mcgraw, Brent Benjamin, real issues, clear differences. Early

release of a convicted child rapist, McGraw yes, Benjamin no.



Expanded gambling, McGraw yes, Benjamin no.

More job killing lawsuits, McGraw yes, Benjamin no.



The choice is clear. McGraw, a radical liberal.

Brent Benjamin, experienced lawyer, family man, active

In church, trusted conservative. Please vote Brent Benjamin for Supreme Court. (PFB: Save of the kids)

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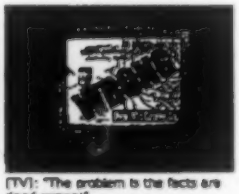
STSUPCT/WV SOTK MCGRAW MISLEADING ADS

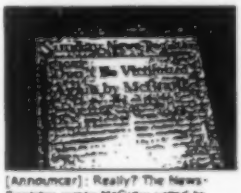
Brand: AND FOR/SAKE/KIDS ORG (BJ29)
Parent: PARENT UNKNOWN
Aired: 10/05/2004 - 10/05/2004
Creative Id: 3580568

[Announcer]: Desperate and unable to defend his radical record,

Justice Warren McGraw's supporters are running misleading ads.

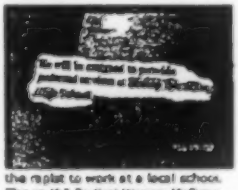


[TV]: "The problem is the facts are dead wrong!"



[Announcer]: Really? The News-Register wrote McGraw voted to

let a child rapist out of prison. And court records show the plan called for



the rapist to work at a local school. The truth? Radical Warren McGraw, too

soft on crime, and too dangerous for our kids.

[PFB]: Sake of the Kids.

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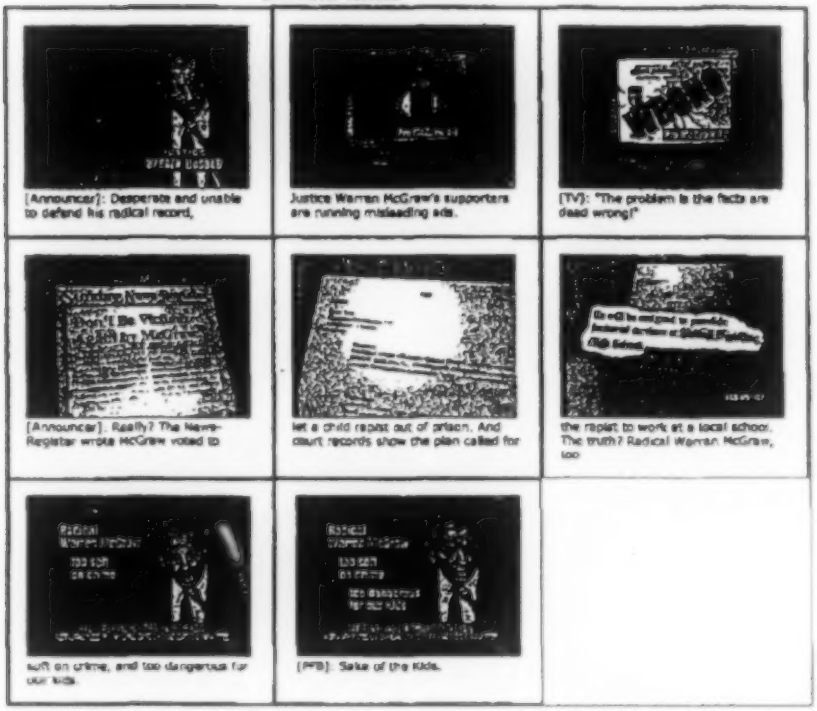
STSUPCT/WV SOTK MCGRAW MISLEADING ADS

Brand: AMC FOR/SAKE/KIDS ORG (P129)
Parent: PARENT UNKNOWN
Aired: 10/05/2004 - 10/05/2004
Creative Id: 3580558



[Announcer]: Desperate and unable to defend his radical record,

Justice Warren McGraw's supporters are running misleading ads.

[TV]: "The problem is the facts are dead wrong!"

[Announcer]: Really? The News-Register wrote McGraw voted to

let a child rapist out of prison. And court records show the plan called for

the rapist to work at a local school. The truth? Radical Warren McGraw, too

soft on crime, and too dangerous for our kids.

[PTB]: Sake of the Kids.

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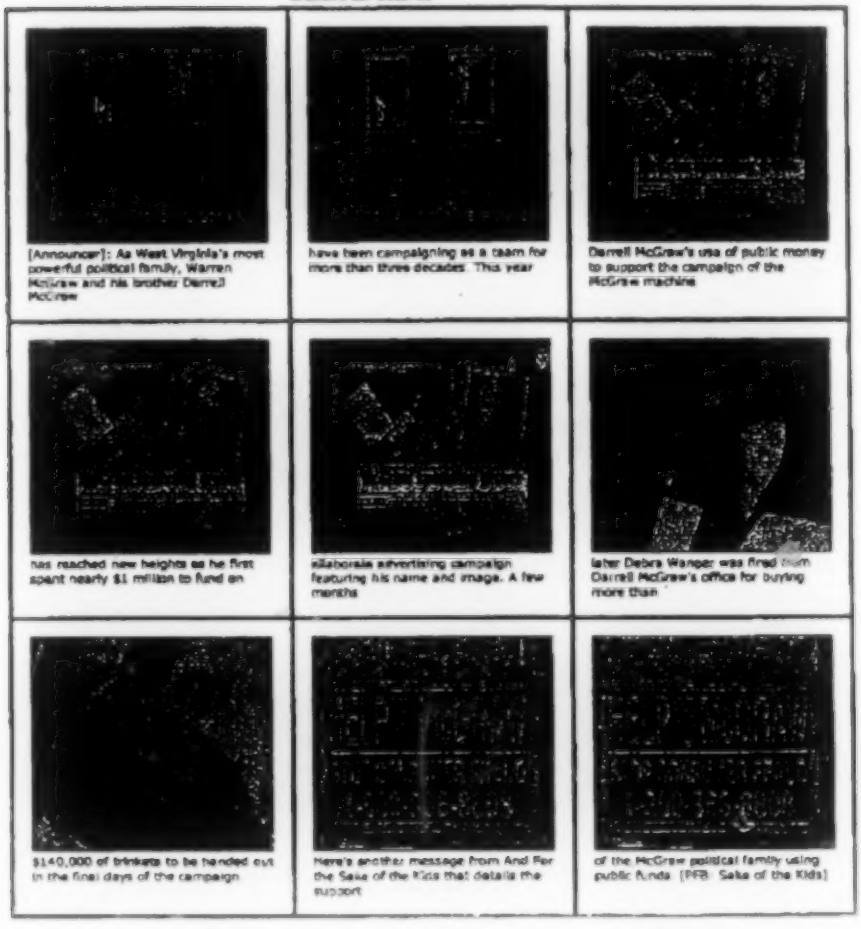
STSUPCT/WV SOTK MCGRAW POWERFUL FAMILY

Brand: POL-SUPREME COURT (0333)
Parent: POLITICAL ADV
Aired: 10/23/2004 - 10/24/2004
Creative Id: 3605788



[Announcer]: As West Virginia's most powerful political family, Warren McGraw and his brother Darrell McGraw

have been campaigning as a team for more than three decades. This year

Darrell McGraw's use of public money to support the campaign of the McGraw machine

has reached new heights as he first spent nearly $1 million to fund an

elaborate advertising campaign featuring his name and image. A few months

later Debra Wamper was fired from Darrell McGraw's office for buying more than

$140,000 of trinkets to be handed out in the final days of the campaign

Here's another message from And For the Sake of the Kids that details the support

of the McGraw political family using public funds. [PFB: Sake of the Kids]

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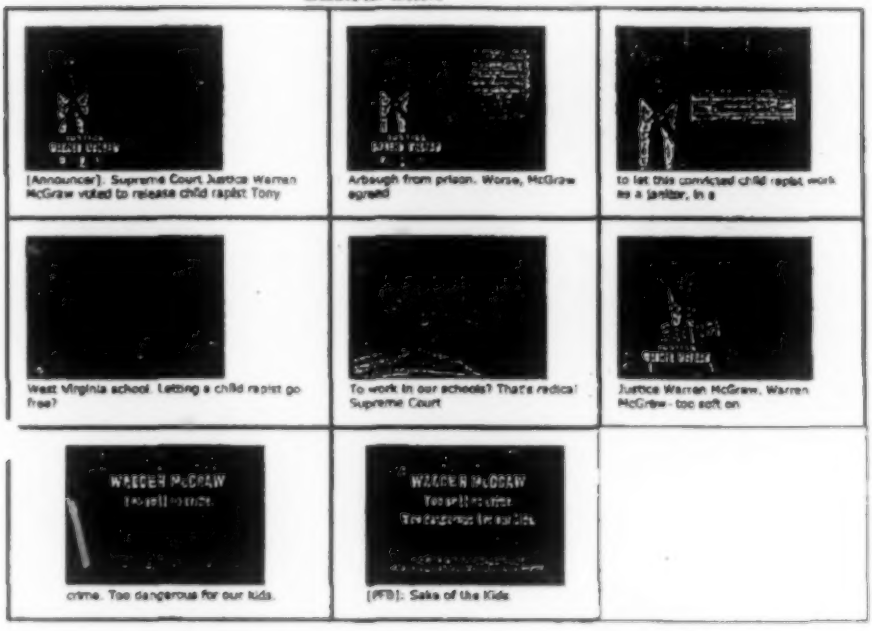
STSUPCT/WV SOTK MCGRAW TOO DANGEROUS

Brand: POL-SUPREME COURT (8333)
Parent: . POLITICAL ADV
Aired: 09/04/2004 - 09/04/2004
Creative Id: 3539572



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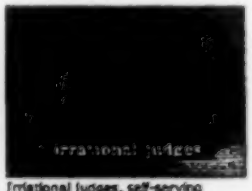
STSUPCT/WV SOTK MCGRAW TIRED

Brand: POL-SUPREME COURT (B333)
Parent: POLITICAL ADV
Aired: 10/28/2004 - 10/30/2004
Creative Id: 3610970

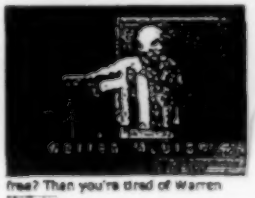
[Announcer]: Tired of lost jobs, sky rocketing car insurance bills,

doctors leaving the state? Tired of rich greedy lawyers?

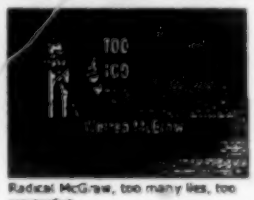


Irrational judges, self-serving lifetime politicians.

Tired of our kids being victimized but criminals going



free? Then you're tired of Warren McGraw.



Radical McGraw, too many lies, too expensive,

too dangerous. West Virginia deserves better. (PFB: Sake of the Kids)

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STSUPCT/WV SOTK RADICAL MCGRAW

Brand: POL-SUPREME COURT (9333)
Parent: POLITICAL ADV
Aired: 09/20/2004 - 09/20/2004
Creative Id: 3559827

[Announcer]: Justice Warren McGraw is too radical for our families. Radical

McGraw voted to let a child rapist go free, agreeing to let him work at a school.

Radical McGraw says he's for keeping workers safe but when a company fired

it's cocaine-using safety director for dishonesty, McGraw agreed he could be

given eight years of salary, despite his drug use. Radical McGraw: too soft on crime.

too soft on drugs, too dangerous for our families. [PFB]: For the Sake of the Kids

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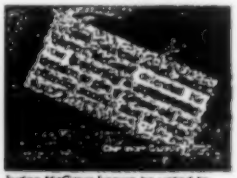
STSUPCT/WV SOTK RADICAL MCGRAW 2

Brand: POL-SUPREME COURT (8333)
Parent: POLITICAL ADV
Aired: 10/23/2004 - 10/24/2004
Creative Id: 3604555

[Announcer]: Radical Warren McGraw, first desperate and unable to defend

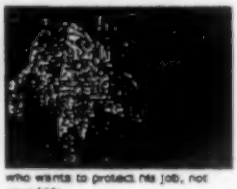
his record, now frantic and denying his record.



Judge McGraw knows he voted to release

convicted child rapist Harbaugh, but he doesn't want you to know.

Why? Because he's a life long politician



who wants to protect his job, not your kids.

Radical McGraw and his ads: desperate, frantic, and lying. (PFB Safe of the Kids)

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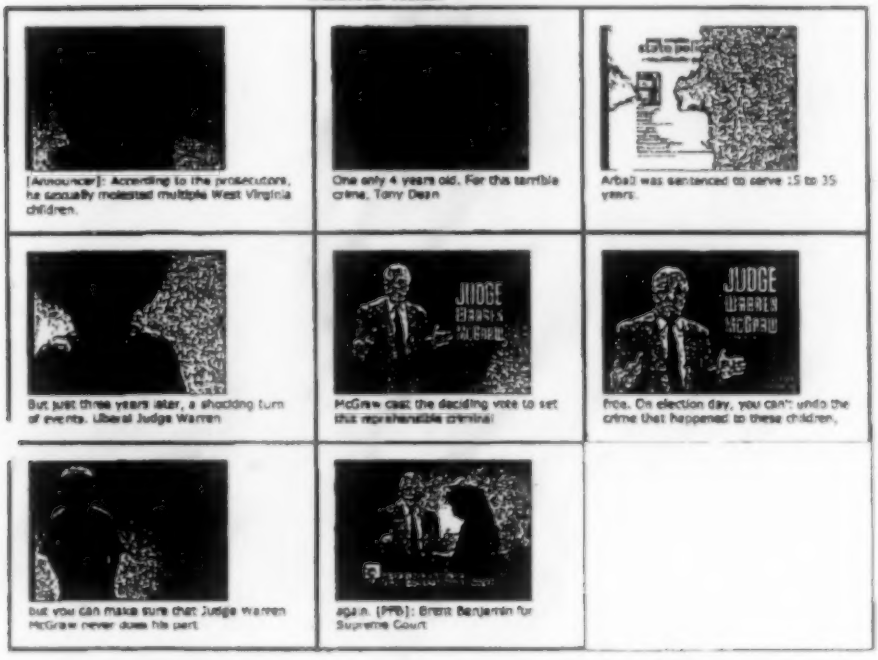
STSUPCT/WV BENJAMIN MCGRAW DENOUNCEMENT

Brand: POL-SUPREME COURT (8333)
Parent: POLITICAL ADV
Aired: 08/25/2004 - 09/25/2004
Creative Id: 3528629



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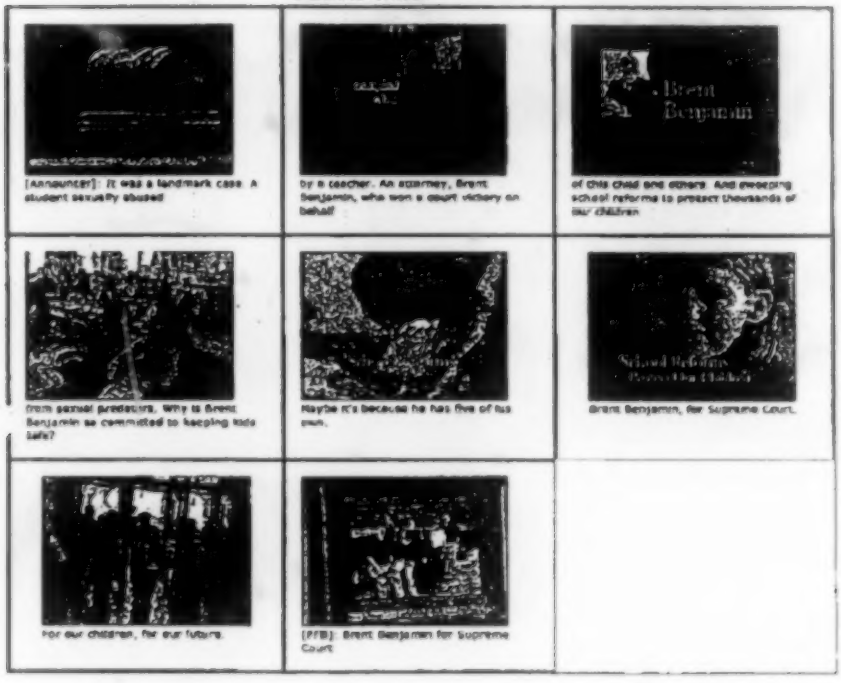
STSUPCT/WV BENJAMIN KIDS SAFETY

Brand: [illegible]
Format: POLITICAL ADV
Aired: 10/01/2004 - 10/02/2004
Creative ID: 35/2932



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In the News

Charleston Daily Mail
Sep 07, 2004

New ads criticize McGraw

Second group emerges spreading message that justice is 'soft on crime'

A new special interest group has jumped into the state Supreme Court race with television advertisements calling state Supreme Court Justice Warren McGraw "soft on crime." The group, And For The Sake of The Kids, refuses to identify its backers or say how much money it has raised. According to state records, the group was organized by Carl Hubbard, the vice president of a Beckley-based coal equipment dealer, and has one member, Dr. Daniel McGraw of Wood County, who is no relation to Warren McGraw. In a written statement issued Sunday, Daniel McGraw said the group is funded by "individual donors here in West Virginia" to talk "about the problems created by incumbent Justice Warren McGraw." The group says it has no connection to Republican high court candidate Brent Benjamin or the GOP. But last week, it began putting up billboards reading "Who is Brent Benjamin?" that are intended to boost the Republican candidate's name recognition among voters. In addition, the group's television and radio ads hammer on the same court decision Benjamin's campaign is using to criticize McGraw. Benjamin was traveling this morning and could not be reached for comment. His campaign manager, Steve Cohen, said the Benjamin camp is "absolutely not" working

with And For The Sake of The Kids. Neither Warren McGraw nor his campaign manager, Andy Gallagher, was available for comment this morning. And For the Sake of The Kids is the latest organization created to help special interest groups get around spending limits in the Supreme Court race. In the spring, the state Chamber of Commerce, plaintiff's lawyers and other groups spent more than $1.6 million on the race between McGraw and his Democratic challenger, Greenbrier County Circuit Judge Jim Rowe. The inspiration for this new group's name came from the belief that "Warren McGraw's decisions on the state Supreme Court have done more to harm working West Virginia families than any other politician of our time," said Daniel McGraw, the Wood County doctor. "For the sake of our kids, we must do better." The group's television and radio ads criticize Justice McGraw for supporting a decision that freed convicted sex offender Tony D. Arbaugh from confinement earlier this year. Arbaugh, 23, was put on probation in 1997 after admitting that he sexually assaulted his half-brother. Court records indicate that he molested other young boys as well. He asked the Supreme Court for help last year after a lower court judge threw him behind bars for probation violations, including drinking and drug use. McGraw and two other justices voted to give Arbaugh another shot at probation because he was the victim of sexual abuse as a child and was considered unlikely to molest another child. The court's majority decision in the case supported a controversial plan to make Arbaugh a janitor at Bishop Donahue High School in Marshall County. (The plan was dropped before Arbaugh set foot in the school. School administrators say they never would have let him work there.) The television

ad by And For the Sake of The Kids shows a schoolroom, children, a jail cell and an empty swing as a narrator hammers McGraw for the supporting the court decision. "Letting a child rapist go free to work in schools, that's radical Supreme Court Justice Warren McGraw," the ad's narrator says. "Warren McGraw. Too soft on crime. Too dangerous for our kids." Benjamin began a $100,000 ad campaign criticizing the decision last month. The campaign dismissed questions about similarities between the advertising efforts. "The issue isn't who's running the ads," said Cohen of the Benjamin campaign. "The issue is, again, that Warren McGraw directed a convicted child sex offender into a work release program that placed him in a community school among children." McGraw has said that his critics are distorting his decision in the Arbaugh case by failing to note that he abandoned the court's unsigned decision for a concurring opinion written by Justice Joe Albright that does not specifically approve plans to make Arbaugh a school janitor.

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WEST VIRGINIA PUBLIC RADIO 10/27/04 BROADCAST RE: CONTRIBUTIONS TO SUPREME COURT RACE[1]

Hughes (Interviewer Kelly Hughes):

Even with some campaign finance reform, individual contributors have found a way to indirectly give their candidate of choice loads of money through 527 groups. Massey Energy's CEO Don Blankenship has given $1.7 million to a 527 group named "And for the Sake of the Kids" that's working to unseat Justice Warren McGraw. McGraw says Blankenship is trying to buy justice.

McGraw: One of the big promoters is A.T. Massey Company. I understand that they're leader is one of my chief opponents and of course he doesn't like the way I voted on an issue that involved the dust assault they were committing on the community of Sylvester in Boone County. That was a case that came before the court, and of course so have a lot of other cases come before the court, and they clearly have an interest in getting somebody on the court that is their friend rather than somebody who will dispense justice. Cause justice I think they're afraid of.

Hughes: So, would it be appropriate for either candidate to hear a case involving Massey?

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[1] Transcript of Broadcast as available on West Virginia Public Website: www.wvpubcast.org/radio/newsroom.

Caprice Roberts is a law professor at West Virginia University and researches judicial independence. She says the high stakes in this year's state Supreme Court race raised concern.

Roberts: What we don't want is for it to look like justice can be bought and that's the concern. Do you want - if you have these sorts of large contributors, then does it appear unfair if they then come before the judge? Can Justice McGraw be fair and impartial if it's a Massey case and the reverse also - you know - well can you really view as impartial if Benjamin was elected to that position? I think it necessarily taints the level of respect for the judiciary and the appearance of impartiality which is different from - we're not indicting the judges and saying we don't believe in them and that we don't think they're capable of factually being independent and separating themselves. But you have to admit that that's hard for any person to do. Our system relies on the fact that we hope judges can do it.

Hughes: And the system could soon be tested. Massey has the option to appeal a Boone County Court decision to the state Supreme Court. In 2002, Massey was found guilty of forcing Harman Mining out of business and ordered to pay the company $50 million. On November 9, the state's division of Environmental Protection is expected to ask the state Supreme Court for the authority to stop

work at a Massey preparation plant. But Republican candidate Brent Benjamin said, if elected to the court, he won't cater to any special interest group or people that have supported his election.

Benjamin: I don't know what they expect. I can tell you what I tell every group is the same. What Brent Benjamin stands for is an equal playing field and, just as I think that it's wrong to have a judge who is captive to one special interest – be it, the trial lawyers or the big international labor unions – I think it is just as wrong to have a judge who is captured by multi-national businesses or out of state insurance companies. One is equally as bad as the other. And what I tell everybody is the same thing. I will follow the law, and if you're prepared for a judge that will do that, I hope for and welcome your support. But if you want something in return, I'm not your candidate.

Hughes: But, Roberts says, in the case of judicial independence, appearances matter too.

Roberts: Part of independence and impartiality is: what's the appearance to the public? Versus just the reality question of do we have actual independence? It is important also to have that appearance. At least that's what judicial code calls for.

Hughes: Roberts says conflicts of interest in the courtroom are less clear when considering the 527 group supporters. For example, West Virginia Consumers for Justice, a 527 group supporting McGraw's re-

election, has taken over $1 million from Consumer Attorneys of West Virginia. Consumer Attorneys of West Virginia is a trade association for trial lawyers and doesn't have to disclose individual contributors.

Roberts: Do they recuse on every single case connected to Massey or connected to Chamber of Commerce? What do you do with that? Is that every single business related case? It's a tough issue. But it puts them in that bind in the first place and certainly I think some justices might well go ahead and decide that that does create the appearance of impartiality as such and they would recuse and then you're not really getting the full court to hear the matter in a way that you had hoped.

Hughes: West Virginia is one of 13 states that elects its Supreme Court judges. In some states, judges are appointed and 11 states uses a system that combines the two. The governor appoints a judge for one term and the public votes on successive terms. For West Virginia public broadcasting, I'm Emily Hughes in Morgantown.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORP., HARMAN MINING CORP., and SOVEREIGN COAL SALES, INC., Plaintiffs below/Movants,	)	
v.	)	Pre-Petition Matter No. 05- (Circuit Court of Boone County Civil Action No. 98-C-192)
A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC., Defendants below/Respondents.	)	

HUGH M. CAPERTON'S MOTION FOR DISQUALIFICATION DIRECTED TO JUSTICE BRENT D. BENJAMIN

Counsel for Massey Defendants:

Michael J. Farrell, Esq. (W.Va. Bar 1168)
Charlotte A. Hoffman, Esq. (W.Va. Bar 5473)
Farrell, Farrell, & Farrell, L.C.
P.O. Box 6457

Huntington, WV 25772-6457
(304) 522-9100

Counsel for Hugh M. Caperton:

Bruce E. Stanley, Esq. (W.Va. Bar 5434)
Tarek F. Abdalla, Esq. (W.Va. Bar 5661)
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-7254

Counsel for Corporate Plaintiffs:

Robert V. Berthold, Jr., Esq. (W.Va Bar 326)
Berthold, Tiano & O'Dell
P.O. Boc 3508
Charleston, WV 25335
(304) 345-5700

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORP., HARMAN MINING CORP., and SOVEREIGN COAL SALES, INC., Plaintiffs below/Movants,	)	
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HUGH M. CAPERTON'S MOTION FOR DISQUALIFICATION DIRECTED TO JUSTICE BRENT D. BENJAMIN

Hugh M. Caperton, by his undersigned counsel, and per Rule 29 of the West Virginia Rules of Appellate Procedure, moves Justice Brent D. Benjamin to disqualify himself from participating in Massey's Petition for Appeal and any related proceedings, stating in support thereof as follows:

1. Rule 29(a) of the Rules of Appellate Procedure states that any party may file a written motion for disqualification of a justice. Given the

recent entry of this Honorable Court's Order granting the Respondents (the "Massey Defendants") an additional 120 days by which to file their Petition for Appeal, and given the Massey Defendants' prior public statements of their intention to seek such an appeal, Hugh M. Caperton ("Caperton") believes that it is now appropriate to raise the issue of whether Justice Brent D. Benjamin should disqualify himself from participating in the disposition of the anticipated Petition for Appeal and any related proceedings.

The Case

2. On August 1, 2002, after a seven (7) week trial, a Boone County jury rendered a verdict in favor of the Plaintiffs on findings of tortious interference with contractual relations, fraudulent misrepresentation, and fraudulent concealment. *See* Amended Circuit Court Order on Jury Award of Punitive Damages, ¶ 2. The trial court found that there was sufficient evidence for a jury to conclude that "Plaintiffs were severely harmed by the conduct of the Defendants, as the corporate and individual Plaintiffs' mining business was destroyed, and the individual was precluded from working in the coal mining industry, thereby forcing the Plaintiffs into bankruptcy and further causing a loss of all rights in the reserves they formerly mined." Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 6. The trial court also found that there was sufficient evidence to support the jury's finding that the Massey Defendants had committed the civil wrongs of tortious interference, fraudulent misrepresentation, and fraudulent concealment. Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 8.

3. Don Blankenship ("Mr. Blankenship") is the chairman, president and chief executive officer of Massey Energy, the parent corporation of each of the Massey Defendants.

4. In finding sufficient evidence to support the jury's verdict, the trial court referenced acts Mr. Blankenship personally committed or personally directed others to commit. For example, the trial court specifically referenced the following evidence adduced at trial:

> (a) The Defendants' Chief Executive Officer, without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation (Wellmore hereinafter) threaten Harman with the declaration of "force majeure" under that Agreement;
>
> * * * *
>
> (f) At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened Harman and Mr. Caperton with long and protracted litigation in the event Harman did not agree to give up its rights to its reserves;
>
> * * * *
>
> (i) After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

(j) The Defendants obtained confidential information at the meeting in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in Harman's assets;

(k) The Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;

* * * *

(p) The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded it was in its financial interest to do so; and

(q) The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶10.

5. In applying the *Garnes* factors to the jury's award of punitive damages, the trial court also noted that the "Defendants expressed little interest in settling this matter on reasonable terms and instead appear to have settled on a strategy (consistent with the statements Mr. Blankenship made to Mr. Caperton in November 1997) designed to wear down the Plaintiffs and their counsel in the hope that

eventually they would be unable to pursue this matter to a more favorable conclusion." Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 18.

6. This appeal will necessarily involve a review of evidence regarding Mr. Blankenship's conduct and motives.

The Legal Standard and Analysis

7. Rule 29(b) states that a justice "shall disqualify himself or herself . . . in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct . . . ."

8. Canon 3(E)(1) states that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."

9. As has been well-publicized, Mr. Blankenship poured millions of dollars, through the 527 organization And For The Sake Of The Kids, into the 2004 West Virginia Supreme Court of Appeals race in order to bring about the election of Justice Benjamin.

10. In addition, however, Mr. Blankenship made significant direct independent expenditures on Justice Benjamin's behalf and solicited contributions to Justice Benjamin's campaign.

11. Specifically, according to filings made with the West Virginia Secretary of State, independent expenditures made by Don Blankenship in direct support of Justice Benjamin totaled at least $508,041.33. Exhibit A, Don L. Blankenship Campaign Financial Statements in Support of Brent

Benjamin, Post-General Election Report, December 6, 2004.

12. Moreover, while such expenditures are presumably "made independently of the candidate's campaign and without the cooperation or consent, or in consultation with, the candidate or candidate's agents," on September 13, 2004, a direct mailing went out under Don Blankenship's signature not only advocating the election of Justice Benjamin, but also requesting direct contributions to the Benjamin for Supreme Court Committee. Exhibit B, Correspondence dated September 13, 2004.

13. Justice Benjamin has acknowledged meeting with Mr. Blankenship, but the content of any communications during those meetings is not known: Exhibit C, "Benjamin: Child Rapist Probation A Mistake," The Register-Herald, October 22, 2004 ("Benjamin said he has only met Blankenship during political events."). Respectfully, "There is no obligation imposed on counsel to investigate the facts known by the judge that could possibly disqualify him. The judge is duty bound to disclose them *sua sponte*." *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374, n.7 (1995).

14. As stated in the commentary to Canon 5(c)(2), which governs candidates subject to public election, "Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers *or others who may appear before the judge*, may be relevant to disqualification under section 3E." (emphasis provided).

15. Clearly, Justice Benjamin is aware of the level of spending by Mr. Blankenship on his behalf. As was recently reported regarding a study on

judicial campaign spending in 2004, "Massey Energy CEO Don L. Blankenship gave more money to political committees targeting judicial candidates in the 2004 state Supreme Court contest than any other contributor to any other race in the country, according to a new report by the Institute on Money in State Politics." Exhibit D, "Blankenship nation's top spender," Times-West Virginian, October 3, 2005.

16. Steve Cohen, a spokesperson for Justice Benjamin's campaign, has stated publicly that "[Benjamin] also had vowed to 'entertain a motion' to recuse himself in cases involving Blankenship and his company." Exhibit E, "W. Va. Supreme Court Justice Defeated in Rancorous Contest," The Washington Post, November 4, 2004.

17. However, from the media accounts, it appears that Justice Benjamin intends to consider the issue *subjectively*: According to one published report, "Benjamin would not promise to remove himself from any case involving Massey Energy, but he said he would remove himself from any case in which *he believed he could not be fair*. He said he thought he could be fair, though. 'I don't know why I wouldn't be,' he said." Exhibit F, "Benjamin knocks Warren McGraw off Supreme Court," Charleston Daily Mail, November 3, 2004 (emphasis provided). *See also*, Exhibit G, "Benjamin May Face Bias Questions," The Charleston Gazette, November 4, 2004. ("Benjamin does not know if he will participate in any of those cases [involving Massey, with specific reference made to this case]. 'I will have to see each case on a case-by-case basis,' he said after promising to recuse himself 'from any case *I don't believe I will be fair in*.'" (emphasis provided)).

18. Respectfully, the Justice's *subjective* determination of his ability to be fair is not the standard governing disqualification. Rather "a judge *shall* disqualify himself or herself in a proceeding *in which the judge's impartiality might reasonably be questioned.*" Code of Judicial Conduct, Canon 3(E)(1) (emphasis provided). Given these parameters, the determination is "whether a reasonable person, knowing all of the relevant facts, would harbor doubts about the judge's impartiality." *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992).

19. As Jack Bowman, "a former Supreme Court clerk, retired professor from the West Virginia University College of Law and a legal columnist for The State Journal," stated in that same publication, "The appearance of impropriety is as important as the impropriety itself. I do think things at the court will calm down, but Brent Benjamin and all the justices next year will really have to be mindful of how they conduct themselves and what they say." Exhibit H, "Justices to Remain on Flood Case," The State Journal, December 2, 2004.

20. Professor Bowman was paraphrasing the standard as previously espoused by the West Virginia Supreme Court of Appeals through former Justice Cleckley's opinion in *Tennant*:

> To protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. *** [T]he United States Supreme Court described the standard for recusal as whether a reasonable and objective person knowing all the facts

> would harbor doubts concerning the judge's impartiality. The Supreme Court stated: "The goal is to avoid even the appearance of partiality." To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

Tennant, 194 W. Va. at 108, 459 S.E.2d at 385.

21. Caperton respectfully submits that the public record is saturated with evidence reasonably questioning the impartiality of Justice Benjamin in this dispute. Caperton has identified more than one hundred media pieces raising the very issue of the perceived impartiality of Justice Benjamin where Mr. Blankenship and Massey are involved, many of them raising the issue in the context of the present case.

22. In addition, Mr. Blankenship and Massey have directly applauded the election of Justice Benjamin in the Company's press releases: "'I believe that the more balanced West Virginia Supreme Court that resulted from last fall's general election will improve the business environment in the state . . . .'" Exhibit I, "Massey Energy Announces Auto & Home Insurance Program," Massey Energy Company/PRNewswire, July 12, 2005 (quoting Mr. Blankenship).

23. Furthermore, on August 22, 2005, John Brabender, media advisor to Justice Benjamin's campaign, gave a presentation at the Republican Party's mid-year meeting in Charleston. At the very same conference on the very same day, Mr. Blankenship was featured as a keynote speaker. Exhibit J, "Massey CEO Don Blankenship to address WVGOP gathering on Saturday," August 19, 2005.

24. The perception of partiality is exacerbated by the fact that Don Blankenship is viewed as having significant political influence throughout West Virginia:

> Blankenship was by far the biggest player for the state GOP in the last election when it came to finances. He contributed the maximum, but more importantly, he worked through the party to put candidates in touch with a huge number of Massey vendors, investors and other contacts who could contribute and raise money. *** [A]s we're finding out, you don't have to hold office in West Virginia to effect change. The newest political movement in West Virginia that is Don Blankenship has demonstrated that.

Exhibit K, "Hoppy's Commentary For Thursday," June 30, 2005, Hoppy Kercheval.

25. As Canon 2(B) states, "A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. . . . nor shall a judge convey or knowingly permit others to convey the impression that they are in a special position to influence the judge."

26. In addition to the numerous media outlets following it, at least one national judicial organization is following the appearance issue as it regards this very case. In Judicature, the journal of the American Judicature Society, writer Seth Stern noted that

> After reciting the oath of office in January, Benjamin pledged that supporters would receive no special treatment though he declined to sit out all matters involving

> Blankenship and Massey coal. "I will try my hardest to apply the law of West Virginia in the best possible manner," he said. He may soon get the chance. In March, Blankenship announced Massey planned to appeal to the state supreme court a trial judge's decision to reject its motion to throw out the $50 million judgment the company faced.

Exhibit L, "West Virginia Supreme Court election shows effectiveness of interest groups," by Seth Stern, *Judicature*, July-August 2005, vol. 89, no. 1, pp. 38-40.

27. In addition to the negative appearance created by Mr. Blankenship's massive spending in the 2004 general election campaign, there is also the issue of Robinson & McElwee's prior representation of Massey Defendant A.T. Massey Coal Co., Inc. Specifically, it is believed that while Justice Benjamin was still employed there, Robinson & McElwee represented A.T. Massey during the Lady H. Coal Company, Inc. bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of West Virginia. *See, e.g., In re Lady H Coal Co., Inc.*, 193 B.R. 233 (Bankr. S.D. W. Va. 1996).

28. This historical relationship between Justice Benjamin's prior law firm and Massey is further complicated by the fact that Justice Benjamin is presumably utilizing the services of Charles R. McElwee, one of the firm's founding partners, in a clerk capacity. Exhibit M, "Benjamin taps McElwee for Supreme Court clerk," The Charleston Gazette, January 14, 2005.

29. Justice Benjamin failed to disqualify himself in the coal severance tax litigation in which a

Massey Energy subsidiary is one of many named parties. As a result, the Huntington Herald-Dispatch, which endorsed Justice Benjamin's candidacy, offered the following editorial opinion:

> Benjamin did not recuse himself from the case. He should have. His impartiality is in doubt given the amount of help he received from Blankenship's money last year. Benjamin is part of a justice system that relies on partisan political elections to select state Supreme Court justices, county circuit court judges and county magistrates. Any Supreme Court justice who accepts campaign contributions from any person, party, group or political action committee, or who benefits from third-party help such as Benjamin received from Blankenship, is similarly tainted. *Benjamin's case is more extreme than the others*, but the same concern applies to all.

Exhibit N, "Benjamin shows need for judicial selection reform," Huntington Herald-Dispatch, September 24, 2005 (emphasis provided).

30. Whatever the basis for the decision to not disqualify in that instance, in the present case, a jury of Boone County citizens found the Massey Defendants guilty of tortious interference and fraud. Their verdicts were based upon evidence of things that Don Blankenship said or did or ordered others to say or do. In the appeal from those verdicts, the Massey Defendants are asking Justice Benjamin to vote to overturn a jury's finding of liability which directly implicates his largest political benefactor.

31. "The legal system will endure only so long as members of society continue to believe that our

courts endeavor to provide untainted, unbiased forums in which justice may be found and done. . . . [F]undamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside." *Tennant*, 194 W. Va. at 107, 459 S.E.2d at 384.

32. Given the foregoing, Caperton respectfully submits that a reasonable person, knowing all of the relevant facts, would harbor doubts about Justice's Benjamin's ability to be impartial and that disqualification is necessary in order to develop and maintain the public's confidence in West Virginia's judiciary.

WHEREFORE, Movant Caperton respectfully requests that Justice Brent D. Benjamin disqualify himself from further participation in any aspect of the Massey Defendants' Petition for Appeal and any related proceedings.

Respectfully submitted,

/s/

Bruce E. Stanley
W.Va. Bar 5434
Tarek F. Abdalla
W.Va. Bar 5661
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Counsel for Hugh M. Caperton

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice

Date: April 7, 2006

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.; Docket No. 060936*

Pending: Underlying Plaintiffs' Motion to Disqualify Justice Brent D. Benjamin

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Pending are motions by plaintiffs below ["movants"] in this case currently pending in the Circuit Court of Boone County, Civil Action No. 98-C-192, seeking my disqualification, or recusal, in matters related to this case. No response has been received from any of the defendants below. With an issue for determination now before this Court, the said motions are now ripe for consideration.

Recusal motions serve an important role in the administration of justice. Each consideration of disqualification must be determined by the specific facts present in the case, and not by generalized subjective preconceptions, conclusions or speculations. A consideration thus necessarily must focus on objective bases specific to a given case and a given jurist, *i.e.*, whether there is a proper basis based on objective factors to believe that a given jurist will be unable to render a fair and impartial decision in a given case. I have therefore carefully considered the bases and accompanying exhibits proffered by the movants.

Despite the amount of materials filed, little if any relates to this Justice and no objective

information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case. What is amply present in the materials filed is surmise, conjecture and political rhetoric.[2]

Consideration of a motion seeking disqualification should not be undertaken lightly. As well-stated by Judge John Sirica, "(t)here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), at FN 360.[3] The proper purpose of such a motion is to preserve, not inhibit, the administration of justice. The measure of whether a Justice should or should not recuse himself necessarily is not the bias or prejudice which a litigant may have regarding the Justice. Our judicial system requires

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[2] Movants include within their exhibits campaign finance reports apparently filed by this Justice's campaign committee. Such exhibits were not reviewed by this Justice as such would be inappropriate.

[3] In the *Haldeman* case, the District of Columbia Circuit Court of Appeals wisely observed in dicta that, "(i)n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision." *Id.* Recusal motions serve an important role in the administration of justice. However, when such motions are instead interposed by litigants in an attempt to predetermine the outcome of cases in their favor or to further subjective stereotypical preconceptions about a judge or justice, such motions may be condemned as an assault upon the administration of justice.

more. A litigant's subjective belief that a Justice may be more or less favorable to his position is therefore an insufficient basis for disqualification.

The instant motions are denied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of April 2006, the following order was made and entered:

Hugh M. Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales, Inc.,
Plaintiffs Below, Petitioner

vs.) No. 05-167

A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, Inc., and Massey Coal Sales Company, Inc., Defendants Below, Respondents

This day came the Honorable Brent D. Benjamin, Justice of the Supreme of Appeals of West Virginia, and notified the Clerk of this Court of his refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

120

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Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

No. 08-22

IN THE
Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

JOINT APPENDIX
Volume 2 of 2
(Pages 340a-700a)

THEODORE B. OLSON
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

ANDREW L. FREY
Counsel of Record
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED JULY 2, 2008
CERTIORARI GRANTED NOVEMBER 14, 2008

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33350

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Plaintiffs Below, Appellees,

V.

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, AND MASSEY COAL SALES COMPANY, INC.
Defendants Below, Appellants.

Appeal from the Circuit Court of Boone County
Honorable Jay M. Hoke, Judge
Civil Action No. 98-C-192
REVERSED AND REMANDED

Submitted: October 10, 2007
Filed: November 21, 2007

D.C. Offut, Jr.
Stephen Burchett
Perry W. Oxley
David E. Rich
Offut, Fisher & Nord
Huntington, West Virginia

Bruce E. Stanley
Tarek F. Abdalla
Reed Smith LLP
Pittsburgh, Pennsylvania
Attorneys for Appellee,
Hugh M. Caperton

Attorneys for the Appellants

Robert V. Berthold, Jr.
Christina L. Smith
Berthold, Tiano & O'Dell
Charleston, West Virginia
David B. Fawcett
Buchanan Ingersoll & Rooney
Pittsburgh, Pennsylvania
Attorneys for Appellees,
Harman Development Corporation,
Harman Mining Corporation, and
Sovereign Coal Sales, Inc.

CHIEF JUSTICE DAVIS delivered the Opinion of the Court

JUSTICES STARCHER AND ALBRIGHT dissent and reserve the right to file dissenting opinions.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syllabus point 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).

2. Our review of the applicability and enforceability of a forum-selection clause is *de novo*.

3. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

4. "'"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

5. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus point 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

6. Determining whether to dismiss a claim based on a forum-selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires classification

of the clause as mandatory or permissive, *i.e.*, whether the parties are *required* to bring any dispute to the designated forum or are simply *permitted* to do so. The third query asks whether the claims and parties involved in the suit are subject to the forum-selection clause. If the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

7. There are two types of forum-selection clauses: mandatory and permissive. A mandatory forum-selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum-selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere.

8. The determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall," or exclusive terms such as "sole," "only," or "exclusive," the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

9. To determine whether certain claims fall within the scope of a mandatory forum-selection clause, the deciding court must base its

determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

10. A plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract.

11. A defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract.

12. A party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal.

Davis, Chief Justice:

The Appellants herein and defendants below, A.T. Massey Coal Company, Inc., and various of its subsidiaries, appeal from a March 15, 2005, order entered in the Circuit Court of Boone County, which denied their post judgment motions for judgment as a matter of law, a new trial, or remittitur, in response to the entry of a judgment of more than $50 million in favor of the appellees herein, and plaintiffs below, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. In this appeal, A.T. Massey Coal Company and its subsidiaries allege numerous errors that purportedly occurred throughout the proceedings below. Based upon our thorough consideration of the parties' arguments, the relevant case law and the record on appeal, we conclude that this case may be resolved on two separate and mutually exclusive grounds. First, we

find that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries, based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit. Assuming, *arguendo*, that the circuit court's denial of the motion to dismiss was not in error, we further conclude that the judgment should be reversed based upon the doctrine of res judicata due to an earlier action that had been litigated in Buchanan County, Virginia. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing this case against A.T. Massey Coal Company and its subsidiaries with prejudice.

I.
FACTUAL AND PROCEDURAL HISTORY

Central to the dispute underlying this appeal is the Harman Mine, an underground coal mine located in Buchanan County, Virginia, that produced very high quality metallurgical coal. Prior to 1993, Harman Mine was owned by Inspiration Coal Corporation (hereinafter referred to as "Inspiration") through three subsidiaries: Harman Mining Corporation (hereinafter referred to as "Harman Mining"), Sovereign Coal Sales, Inc. (hereinafter referred to as "Sovereign"), and Southern Kentucky Energy Company (hereinafter referred to as "Southern"). For many years, all of the coal from the Harman Mine had been sold to Wellmore Coal Corporation (hereinafter referred to as "Wellmore"), a subsidiary of United Coal Corporation. In April 1992, Sovereign and Southern entered a coal supply agreement (hereinafter referred to as "1992 CSA") with Wellmore. Under the 1992 CSA, Wellmore was

to purchase from Sovereign and Southern approximately 750,000 tons of coal per year for a period of ten years.

In 1993, Hugh M. Caperton (hereinafter referred to as "Mr. Caperton"), a plaintiff below and appellee herein, formed Harman Development Corporation[1] (hereinafter referred to as "Harman Development").[2] In that same year, Harman Development purchased the three previously mentioned subsidiaries of Inspiration: Harman Mining,[3] Sovereign[4] and Southern, and thereby became the owner of the Harman Mine.[5] Harman Development, Harman

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[1] Harman Development Corporation is a Virginia corporation that has its principal place of business in Beckley, West Virginia.

[2] Mr. Caperton had worked for Sovereign when it was a subsidiary of Inspiration. Mr. Caperton sold coal on behalf of Sovereign, including coal from the Harman Mine. Mr. Caperton left Sovereign to form his own coal brokerage company, Dominion Energy. Through Dominion Energy, Mr. Caperton continued to broker coal from the Harman Mine on behalf of Inspiration. In 1993, Dominion Energy became Harman Development Corporation.

[3] Harman Mining is a Virginia corporation that transacts business in West Virginia and is a wholly-owned subsidiary of Harman Development.

[4] Sovereign is a Delaware corporation that has its principal place of business in Beckley, West Virginia. Sovereign is a wholly-owned subsidiary of Harman Development.

[5] The plan Harman Development established for the Harman Mine was to mine the reserves in a way that would allow convenient access to adjoining reserves owned by Pittston Coal Company. The appellees explain that it is commonplace in the mining industry for coal companies to sell or lease their properties to other operators when it makes economic sense to allow someone else to mine their coal. Due to the topography of

Mining and Sovereign are all plaintiffs to this action below, and are appellees herein (hereinafter collectively referred to as "the Harman Companies"). In 1997, in order to fund improvements to the Harman Mine, the Harman Companies sold all the Harman Mine reserves to Penn Virginia Corporation, and then leased back those reserves that could be mined in a cost-effective manner.

From the time the Harman Companies became owners of the Harman Mine until 1997, coal from the Harman Mine was purchased by Wellmore in accordance with the 1992 CSA. Prior to the expiration of the 1992 CSA, in March of 1997, a new CSA with a higher price per ton of coal (hereinafter referred to as "the 1997 CSA") was negotiated between Sovereign, Wellmore and Harman Mining.[6] The 1997 CSA was to be in effect for a period of five years, commencing retroactively on January 1, 1997. However, the 1997 CSA included, among other things, a *force majeure* clause,[7] and a forum-selection

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[Footnote continued from previous page]
the area, the Harman Mine provided better access to the Pittston reserves than Pittston itself had. Thus, Mr. Caperton hoped to one day lease the Pittston reserves. However, no lease agreement was ever executed between Pittston and any of the Harman Companies.

[6] The 1997 CSA specified that Wellmore would purchase a minimum tonnage of coal, 573,000 tons per year, and also gave Wellmore the option to purchase all of the Harman Mine's production. Historically, Wellmore had purchased all of the coal that the Harman Mine produced.

[7] The *force majeure* clause was nearly identical to one that had been included in the 1992 CSA, and stated, in relevant part,

[Footnote continued from previous page]

> The term "force majeure" as used herein shall mean any and all causes reasonably beyond the control of SELLER or BUYER, as applicable, which cause SELLER or BUYER to fail to perform hereunder, such as, but not limited to, acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER. . . . Pertaining to BUYER, the term "force majeure" as used herein shall further include occurrence(s) of a force majeure event at any of BUYER's customer's plants and facilities, except that the effects of any such force majeure event shall not justify BUYER in reducing its purchase of coal hereunder in greater proportion than the coal to be purchased hereunder bears to all BUYER's sources of supply, including BUYER's own mines, for BUYER's metallurgical coal sold to domestic coke producers. SELLER and BUYER shall promptly notify the other following commencement of a force majeure. If because of a force majeure SELLER or BUYER, respectively, is unable to carry out its obligations under this Agreement and if such Party shall promptly give to the other Party written notice of such force majeure, then the obligations of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by such force majeure and during its continuance; provided however, (i) that such

clause requiring that "[a]ll actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia."[8]

During the course of the 1992 CSA, and at the time the 1997 CSA was executed, one of Wellmore's primary customers was LTV Steel (hereinafter referred to as "LTV"). Wellmore sold and shipped nearly two-thirds of the coal it purchased from the Harman Companies to LTV's coke plant located in Pittsburgh, Pennsylvania.[9] On July 19, 1997, LTV announced that it intended to close its Pittsburgh coke plant due to a change in emissions regulations promulgated by the Environmental Protection Agency.

A.T. Massey Coal Company (hereinafter referred to as "Massey"), a defendant below and appellant herein, had tried unsuccessfully for several years to sell its West Virginia mined coal directly to LTV.[10] Due to its lack of success in selling to LTV on its

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[Footnote continued from previous page]

obligations shall be suspended only to the extent made necessary by such force majeure and only during its continuance, and (ii) that the Party giving such notice shall act promptly in [sic] reasonable manner to eliminate such force majeure. . . .

8 This forum-selection clause is identical to one that had been included in the 1992 CSA.

9 LTV purchased from Wellmore a premium blend of coal from the Harman Mine mixed with other, lesser quality coals. The circuit court expressly found that "[c]oal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV."

10 This coal was inferior in quality to the coal obtained from the Harman Mine and sold to LTV through Wellmore.

own, Massey determined to acquire LTV's supplier Wellmore and its parent corporation, United Coal Corporation (hereinafter referred to as "United").[11] Massey purchased Wellmore and United on July 31, 1997. Since there was no long-term agreement between LTV and Wellmore, Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. An internal Massey memorandum admitted during trial revealed that Massey understood there were risks to its plan, most notably the possibility that the relationship between LTV and Wellmore might not continue under Massey ownership of Wellmore. The circuit court found that, in spite of this risk, and despite the knowledge that LTV was "extremely reluctant to change a long-established, successful coal blend" that included coal from the Harman Mine, Massey nevertheless "provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract."[12] As a consequence of Massey's actions, LTV ceased buying coal from Wellmore. Thereafter,

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[11] The Harman Companies and Mr. Caperton presented evidence at trial to establish that Massey had for some time desired to sell coal to LTV, and opined that it was this desire that motivated Massey's acquisition of Wellmore, and further motivated Massey to eliminate the Hannan Companies as its competitors via the destruction of those companies.

[12] Massey made these demands notwithstanding its knowledge that LTV had historically demonstrated a preference for multiple suppliers and had not entered multi-year coal supply contracts. Additionally, the firm price for its coal that Massey quoted to LTV represented "a handsome improvement" over the prices at which Massey had been selling its coal.

on August 5, 1997, Wellmore, at the direction of Massey, gave notice to the Harman Companies by letter stating that, if LTV did in fact close its Pittsburgh plant, then Wellmore anticipated a pro rata reduction in tonnage under the *force majeure* clause of the 1997 CSA.

Subsequent to Wellmore's August 5 letter, Massey entered negotiations with the Harman Companies for the purchase of the Harman Mine. During the course of these negotiations, confidential information regarding the Harman Mine's operations, including its desire to eventually mine adjoining Pittston reserves,[13] as well as confidential information pertaining to the finances of the Harman Companies and of Mr. Caperton, personally, was shared with Massey. The Harman Companies also expressed to Massey their disagreement that the LTV closure of its Pittsburgh coke plant constituted a *force majeure* event.

Thereafter, on December 1, 1997, Wellmore, at Massey's direction, declared *force majeure* based on LTV's closure of its Pittsburgh coke plant, and advised the Harman Companies that it would purchase only 205,707 tons of the 573,000 minimum tons of coal required under the 1997 CSA. According to the express findings of the circuit court in this matter,

> [o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business.

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13 *See supra* note 5.

> Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "force majeure" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "force majeure", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

Massey continued in negotiations with the Harman Companies and Mr. Caperton for Massey's purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, "ultimately collapsed the transaction in such a manner so as to increase [the Harman Companies'] financial distress."[14] In addition, Massey utilized

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[14] According to testimony presented at trial, during the negotiations of Massey's potential purchase of the Harman Mine, Massey represented that it would assume the Harman coal reserves lease from Penn Virginia "as-is." However, just prior to the scheduled closing of Massey's purchase of the Harman Mine, Massey demanded changes to numerous material terms of the Harman Companies lease agreement with Penn Virginia. Massey and Penn Virginia could not agree on

the confidential information it had obtained from the Harman Companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to others and thereby decrease its value. During the negotiations for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Hannan Companies' obligations.[15] Subsequently, the Harman Companies, and Mr. Caperton, personally, filed for bankruptcy.[16]

Thereafter, in May 1998, Harman Mining and Sovereign sued Wellmore in the Circuit Court of Buchanan County, Virginia, alleging causes of action for breach of contract and for breach of the covenant of good faith and fair dealing arising from Wellmore's declaration of *force majeure*. However, Harman Mining and Sovereign voluntarily withdrew their tort claim prior to trial. Following trial on the contract claim, a jury found in favor of Harman

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[Footnote continued from previous page]
terms and, therefore, Massey's purchase of the Harman Mine was never completed.

15 Mr. Caperton had personal obligations to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial, among others.

16 The circuit court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his detriment on numerous false representations made by Massey. One example of such false representations made by Massey was that it lead Mr. Caperton to believe that it intended to close its purchase of the Harman Mine on January 31, 1998, when, in fact, Massey had already determined not to close the transaction.

Mining and Sovereign and awarded $6 million in damages.[17]

Shortly after the Virginia action was filed, on October 29, 1998, Harman Development, Harman Mining, Sovereign and Mr. Caperton filed the instant action in the Circuit Court of Boone County, West Virginia, against A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. (hereinafter collectively referred to as "the Massey Defendants").[18] The first amended complaint in this action was filed on December 10, 1998, and asserted claims of tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentation, civil conspiracy, negligent misrepresentation, and punitive damages. Though numerous pre-trial motions were filed in the underlying action, two in particular are relevant to our resolution of this matter. First, in December 1998, the Massey Defendants filed a motion to dismiss. In their memorandum in support of the motion, the Massey Defendants argued, *inter alia*, that the forum-selection clause of the 1997 CSA required this action to be filed in Buchanan County,

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[17] Wellmore appealed the verdict to the Supreme Court of Virginia, however the appeal was refused on technical grounds. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002).

[18] Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance coal Company, and Massey Coal Sales Company, Inc., are all subsidiaries of A.T. Massey Coal Company, Inc.

Virginia. The circuit court denied the Massey Defendants' motion to dismiss. Thereafter, in April 2002, the Massey Defendants filed a motion for summary judgment, arguing, in relevant part, that the instant action was barred under the legal principal of res judicata. The circuit court denied this motion as well.

Ultimately, only three of the theories of liability asserted in this action were presented to the jury for a verdict:[19] tortious interference, fraudulent misrepresentation and fraudulent concealment. On August 1, 2002, the jury found in favor of all plaintiffs on all three grounds and returned a verdict, including punitive damages, of $50,038,406.00. On August 30, 2002, the Massey Defendants filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, remittitur. Following a lengthy delay, by order entered March 17, 2005, the circuit court denied the post-trial motions. This appeal followed.[20]

II.

STANDARD OF REVIEW

Our analysis of this case will consider two issues: first, whether the circuit court erred in denying the Massey Defendants' motion to dismiss on the issue of the forum-selection clause, and, in the alternative, whether the circuit court erred in denying the

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19 The punitive damages claim was presented also.

20 There were additional delays in this case involving the trial transcript. The circuit court certified the transcript on August 25, 2006. This appeal was then filed on October 24, 2006.

Massey Defendants' motion for summary judgment on the issue of res judicata.

We first review the correctness of the circuit court's denial of the Massey Defendants' motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA. "This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).[21] However, we now hold that "[o]ur review of the applicability and enforceability of [a] forum[-]selection clause is *de novo*." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993) (citing *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir.1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992)). *Cf* Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

We next consider the circuit court's denial of the Massey Defendants' motion for summary judgment on the issue of res judicata. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). For purposes of our *de novo* review, we further note that

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21 "Courts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5], at 376 (2d ed. 2006).

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter*. Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*. With these considerations in mind, we proceed to address the dispositive issues raised in this appeal.

III.

DISCUSSION

At the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified. As we will demonstrate below, the law simply did not permit this case to be filed in West Virginia.

Although numerous issues have been raised on appeal in this case, we find that the instant matter may be resolved on the issue of the forum-selection clause contained in the 1997 CSA between Sovereign Coal Sales, Inc., Wellmore Coal Corporation and

Harman Mining Corporation. In the alternative, this case may be resolved based on the doctrine of res judicata. We address each of these issues in turn.

A. Forum-Selection Clause

The 1997 CSA between Sovereign, Wellmore and Harman Mining provided that the "[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia. . . ." In the proceeding below the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant action should therefore be dismissed.[22] The circuit court denied the motion to dismiss.

This case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses. By way of definition, it has been recognized that "[a] 'forum selection' provision in a contract designates a particular state or court as the jurisdiction in which the parties wil litigate disputes

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[22] "A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit." *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) (citations omitted).

arising out of the contract and their contractual relationship." 17A Am. Jur. 2d *Contracts* § 259, at 255 (2004) (footnote omitted). While forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable:

> The right of an injured party to legal redress is jealously guarded by the courts. Formerly, no agreement confining the right of a party to sue in a particular court or tribunal or in the courts or tribunals of a certain jurisdiction, or to determine the venue of a suit in such a way as to deprive the defendant of his statutory privileges as to place of trial was enforced, unless perhaps where the agreement was made after the cause of action had arisen and was part of a fair compromise. A minority of courts still follow this older rule.
>
> During the past two decades, the rules governing the validity of various "forum selection" clauses have been relaxed considerably, the courts following a pattern similar to that which has already been discussed in connection with arbitration clauses. Thus, while it remains true today that a clause or provision *unreasonably or improperly* attempting to deprive a court of its jurisdiction will not be enforced, the modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. This trend is directly traceable to the landmark case of *M/S Bremen v Zapata Off-Shore Co.*, [407

> U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)], in which the United States Supreme Court upheld the validity of a freely negotiated forum selection clause in a commercial contract between an American firm and a German concern, which specified that any dispute must be determined by the English courts. . . .

7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 15:15, at 290-301 (4th ed. 1997) (footnotes omitted). *See also* 17A Am. Jur. 2d *Contracts* § 259, at 255-56 ("While there is contrary authority, generally modern courts will enforce forum-selection clauses entered into by parties to a contract provided that the clauses are not unfair, unreasonable, or unjust under [the] circumstances." (footnotes omitted)).

Although this Court has not had occasion to address substantive issues involving forum-selection clauses, we have previously indicated our general approval of forum-selection clauses by noting that they are not contrary to public policy:

> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W. Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W. Va. 137, 173 S.E.2d 383

> (1970). *Board of Education v. W. Harley Miller, Inc.*, 159 W. Va. 120, 221 S.E.2d 882 (1975). . . .
>
> As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. "Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just". *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D.W.Va. 1976). *See also, Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D. W. Va. 1980).

General Elec. Co. v. Keyser, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(3)[5], at 376-77 (2d ed. 2006) (hereinafter referred to as "*Litigation Handbook*") ("The Supreme Court has indicated in passing that forum selection clauses are not contrary to public policy." (citing *General Electric Co. v. Keyser*)).

Having found no impediment to the enforcement of forum-selection clauses in general, we now must endeavor to specifically determine whether the forum-selection clause of the 1997 CSA should have been enforced in the instant case.

In *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit articulated a four-part test for determining whether a claim should be dismissed based upon a forum-selection clause. We find this

test supported by reason and logic, and by the manner in which such cases have been resolved in other courts; therefore, we now hold that

> [d]etermining whether to dismiss a claim based on a forum[-]selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. . . . The second step requires [classification of] the clause as mandatory or permissive, *i.e.*, . . . whether the parties are *required* to bring any dispute to the designated forum or [are] simply *permitted* to do so. [The third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . .
>
> If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching."

Phillips, 494 F.3d at 383-84 (internal citations omitted) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972)). *See also Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) ("Having found that the forum selection clause in the Consulting Agreement is valid, binding, and

enforceable, we must next consider whether it applies to any or all of Dexter's claims against Baan."); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) ("In deciding whether to enforce a mandatory forum-selection clause, courts must determine whether the claims in the case at hand fall within the scope of the forum-selection clause and whether the court should enforce the clause. In addition to resolving issues of scope and enforceability, courts also may have to decide issues as to whether nonsignatories to the contract can enforce the forum-selection clause contained therein."). We now follow this analysis to ascertain whether the instant case should have been dismissed pursuant to the forum selection clause.

1. Reasonably Communicated. The first question we must answer is whether the forum-selection clause was reasonably communicated to Mr. Caperton and the Harman Companies. "Although a strong presumption of enforceability attaches to forum selection clauses, *see M/S Bremen*, 407 U.S. at 15, 92 S. Ct. 1907, '[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff . . . .'" *Electroplated Metal Solutions, Inc. v. American Servs., Inc.*, 500 F. Supp. 2d 974, 976 (N.D. Ill. 2007) (internal citation omitted) (quoting *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995)). *See also* 17A C.J.S. *Contracts* § 237, at 211 (1999) ("A forum selection clause is unenforceable as to a plaintiff who did not have sufficient notice of the forum selection clause prior to entering the contract.").

This prong of the analysis is easily resolved as Mr. Caperton and the Harman Companies have not argued that the forum-selection clause was not reasonably communicated to them. Furthermore, Sovereign and Harman Mining were parties to the agreement, and Mr. Caperton signed the contract in his capacity as president of Sovereign. Therefore, these parties cannot claim ignorance of the plainly worded forum-selection clause, which "clearly convey[ed] to any reader that any action regarding the [CSA] must be brought in a specific court, and the location of that court [was] readily ascertainable . . . ." *Klotz v. Xerox Corp.*, No. 07 CIV 1734 (GEL),___ F. Supp. 2d ___ 2007 WL 3100220, at *2 (S.D.N.Y. Oct. 22, 2007). Moreover, though Harman Development, the parent company of Sovereign and Harman Mining, was not a party to the 1997 CSA, Mr. Caperton is the sole owner of Harman Development. Since Mr. Caperton had knowledge of the clause, Harman Development is deemed to have knowledge of the clause. *See Clark v. Milam*, 192 W. Va. 398, 402, 452 S.E.2d 714, 718 (1994) ("Generally, a corporation 'knows,' or 'discovers,' what its officers and directors know."). Thus, we find sufficient evidence in the record of this case to establish that the forum-selection clause was reasonably communicated to those who now resist its application.

2. Mandatory or Permissive. The second step in our analysis is to determine whether the forum-selection clause is mandatory or permissive. It has been widely recognized, and we now expressly hold that "[t]here are two types of forum[-]selection clauses: mandatory and permissive. A mandatory forum[-]selection clause contains clear language indicating that jurisdiction is appropriate only in a

designated forum. A permissive forum[-]selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere." *Litigation Handbook* § 12(b)(3)[5], at 376 (footnote omitted) (citing *K.&V. Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494 (10th Cir. 2002)). *See also Weisser v. PNC Bank, N.A.*, No. 3D07-487, ___ So. 2d ___, 2007 WL, 2848118, at *2 (Fla. Dist. Ct. App. 2007) ("'Permissive [forum selection] clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.' . . . In contrast, mandatory forum selection clauses provide 'for a mandatory and exclusive place for future litigation.'" (citations omitted)); *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 (NAM) (GJD), ___ F. Supp. 2d ___, 2007 WL 2891981, at *8 (N.D.N.Y. 2007) ("A mandatory forum selection clause grants exclusive jurisdiction to a selected forum and should control absent a strong showing that it should be set aside. . . . In contrast, 'a permissive forum selection clause indicates the contracting parties' consent to resolve their dispute in a given forum, but does not require the dispute to be resolved in that forum. . . .'" (internal citations omitted)).

Resolution of the question of whether a forum-selection clause is mandatory or permissive requires scrutiny of the particular language used.

> In determining whether a forum selection clause is mandatory or permissive, the language of the clause must be examined. For example, in *Quinones*, the Florida Supreme Court found that the forum

> selection clause was permissive, not mandatory, because it provided that the creditor **"may"** institute legal proceedings in specified courts, not that it **"shall"** do so. [*Quinones v. Swiss Bank Corp. (Overseas)*, S.A., 509 So. 2d 273, 275 (Fla. 1987)] (emphasis added).... "Conversely forum selection clauses which state or clearly indicate that any litigation **must** or **shall** be initiated in a specified forum are mandatory." *Shoppes Ltd.[P'ship v. Conn*, 829 So. 2d 356, 358 (Fla. Dist. Ct. App. 2002)] (emphasis added) (citing *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. 1st DCA 1999)).

Weisser, 2007 WL 2848118, at *2-3. The *Weisser* Court also cited *Regal Kitchens, Inc. v. O'Connor & Taylor Condominium Construction, Inc.*, 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005), wherein the court examined a forum-selection clause which stated that "[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, *with proper venue in Palm Beach County*." (emphasis added). The *Regal Kitchens* court observed that the clause was mandatory as to the law to be applied, but permissive as to the forum, commenting that,

> [i]n the instant case, although the venue clause unequivocally states that Florida law shall apply to any litigation of the subcontract, it lacks mandatory language or words of exclusivity to show that venue is proper only in Palm Beach County. *See Shoppes Ltd. P'ship v. Conn.*, 829 So. 2d at 357-58. That is to say, this clause does not

> unequivocally mandate that a controversy or dispute be litigated in Palm Beach County, nor does it waive any other territorial jurisdiction. The language merely allows a party to file suit in Palm Beach County.

894 So. 2d at 291-92.

Thus, to be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.

> A forum selection clause is mandatory if jurisdiction and venue are specified with mandatory or exclusive language. *John Boutari & Sons, Wine & Spirits, S.A. v. Attiki Imp. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994). In *Boutari*, the Second Circuit held that "[t]he general rule in cases containing forum selection clauses is that [w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." *Boutari*, 22 F.3d at 52 . . . .

Great N. Ins. Co., 2007 WL 2891981, at *8 (additional citations omitted). *See also K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494, 499 (10th Cir. 2002) ("'[W]here venue is specified [in a forum-selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum-selection clause], the clause will generally not be enforced unless there is some further language indicating the parties'

intent to make venue exclusive.'" (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir.1992)). *See also Printing Servs. of Greensboro, Inc. v. American Capital Group, Inc.*, 637 S.E.2d 230, 232 (N.C. Ct. App. 2006) ("'[T]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.'" (quoting *MarkGroup Int'l, Inc. v. Still*, 566 S.E.2d 160, 161 (N.C. Ct. App. 2002)).

An example of a case illustrating a forum-selection clause that used mandatory language is *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). In that case, the plaintiff entered into a contract with the defendant to distribute equipment manufactured by the defendant. The contract contained a forum-selection clause that contained the following pertinent language: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." *Docksider*, 875 F.2d at 763. A dispute arose over the contract that resulted in the plaintiff filing an action against the defendant in a federal district court in California. The district court dismissed the action on the grounds that the forum-selection clause required the case be filed in a Virginia court. The plaintiff appealed on the grounds that the forum-selection

clause was permissive, not mandatory. The Court of Appeals for the Ninth Circuit disagreed with the plaintiff, ruling as follows:

> The critical language in [the clause] is the final sentence: "Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." The district judge concluded that this language represented the parties' intent to pursue any litigation that arose only in Virginia. [Plaintiff] contends that this interpretation is erroneous because the contractual language does not contain any express mandatory term such as "exclusively" that would indicate the parties' intent to vest Virginia with exclusive jurisdiction. [Plaintiff] has cited numerous cases as support for this position, relying principally on *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987).
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> . . . .
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> *Hunt Wesson* is distinguishable because the forum selection clause underlying this action contains the additional sentence stating that "[v]enue of any action brought hereunder shall be deemed to be in . . . Virginia." This language requires enforcement of the clause because [plaintiff] not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not

> several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in Virginia.

Docksider, 875 F.2d at 763-64.

In accordance with the foregoing authorities, we now hold that the determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall,"[23] or exclusive terms such as "sole," "only," or "exclusive," the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

Turning to the instant case, the forum-selection clause utilized mandatory language that identified the jurisdiction wherein disputes would be tried: "[a]ll actions brought in connection with this Agreement *shall* be filed in and decided by the Circuit Court of Buchanan County, Virginia." (Emphasis added). Accordingly, we are presented with a mandatory forum-selection clause. *See Ex parte Bad Toys Holdings, Inc.*, 958 So. 2d 852, 856

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[23] This Court has often recognized that "'[i]t is well established that the word "shall," in the absence of language . . . showing a contrary intent . . ., should be afforded a mandatory connotation.'" Syl. pt. 1, in part, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). *See also State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)).

(Ala. 2006) ("The forum-selection clause in the purchase agreement provides that ' [v]enue for any legal action which may be brought hereunder *shall* be deemed to lie in Sullivan County, Tennessee' (emphasis added). The . . . use of the word 'shall' in the forum-selection clause makes the clause mandatory, not permissive."); *Town of Homer v. United Healthcare of Louisiana, Inc.*, 948 So. 2d 1163, 1167 (La. Ct. App. 2007) ("We find the forum selection clause at issue to be clear and explicit. The clause expressly states that the proper venue ***for any legal action shall*** be East Baton Rouge Parish. There is no ambiguity in this mandatory provision."); *Polk County Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co., Inc.*, 734 N.W.2d 750, 758 (Neb. 2007) ("The forum selection clause in the Thornridge lease provides that any action concerning the lease 'shall be' brought in Pennsylvania. We read this forum selection clause to be a mandatory clause . . ."); *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) ("Because the clause states that 'all' disputes 'shall' be at Siempelkamp's principal place of business, it selects German court jurisdiction exclusively and is mandatory."). Having determined that the forum-selection clause at issue in this case is a mandatory clause, we must now determine whether the claims and parties involved in the suit are governed by said clause.

3. Claims and Parties. The third part of our analysis is to determine whether the claims and parties involved in the suit are governed by the forum-selection clause. We address these questions separately.

a. Are the claims asserted in the instant suit subject to the forum-selection clause? Before the circuit court,[24] Mr. Caperton and the Harman Companies argued that the claims asserted in this action are not governed by the forum-selection clause because they are tort, as opposed to contract, claims. We disagree.

It has been recognized that,

> [w]hen a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause. . . . The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod, Inc., 234 S.W.3d 679, 687-88 (Tex. App. 2007) (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221-22 (5th Cir. 1998)). *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 388 (2d Cir. 2007) ("[W]hen ascertaining the applicability of a contractual provision to particular claims, we examine the substance of those claims, shorn of their labels."). Accordingly, we expressly hold that, to determine whether certain claims fall within the scope of a mandatory forum-selection

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[24] For inexplicable reasons, Mr. Caperton and the Harman Companies did not brief this issue before this Court. However, because our review is of matters as they existed before the trial court at the time the Massey Defendants' filed their motion to dismiss, we will consider the arguments asserted by Mr. Caperton and the Harman Companies in opposition to the motion to dismiss.

clause, the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Turning to the case at hand, we must first examine the language of the mandatory forum-selection clause at issue. Because the 1997 CSA expressly states that it "shall be . . . construed . . . in accordance with the substantive laws of the Commonwealth of Virginia," we will scrutinize the language of the clause pursuant to Virginia law. Notably, under Virginia law, "[w]ritten contracts are construed as written, without adding terms that were not included by the parties. When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words that the parties used are normally given their usual, ordinary and popular meaning." *Heron v. Transportation Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007).

The forum-selection clause of the 1997 CSA states in plain language that it applies to "[a]ll actions brought in connection with this Agreement." Due to the inclusion of the phrase "all actions," we perceive no intent by the parties to this agreement to limit in any way the type of actions to which it applies. Thus, for example, it would apply equally to contract claims, tort claims and statutory claims, so long as such claims are "brought in connection with" the 1997 CSA.

Considering next the "usual, ordinary and popular meaning" of the phrase "in connection with," we find the intended scope of the forum-selection clause to be quite broad. *Heron*, 650 S.E.2d at 702. The word "connection" in the context herein used, is

generally understood to mean "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in another." II The Oxford English Dictionary 838-39 (1970 re-issue). *See also* Random House Webster's Unabridged Dictionary 431-32 (2d ed.1998) (defining "connection" in part as "association; relationship . . ."); Webster's Third New International Dictionary 481 (1993) (defining "connection" in relevant part as "the state of being connected or linked . . . relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)"). Thus, so long as the claims asserted in this action bear a logical relationship to the 1997 CSA, they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law.

Other courts considering forum-selection clauses that contained broad language such as that used in the instant clause have similarly determined that the clauses were not intended to apply merely to breach of contract claims, but rather were intended to apply to other claims as well. For example, the United States Court of Appeals for the Second Circuit was asked to determine the scope of a forum-selection clause that stated: "'any legal proceedings that may arise out of [the agreement] are to be brought in England." *Phillips*, 494 F.3d at 382. In determining the meaning of "arise out of," the court contrasted language such as "in connetion with" as being more expansive: "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be

'associated with,' or '*arise in connection with*' the contract." *Id.*, 494 F.3d at 389 (emphasis added) (citations omitted). In a different case, the Second Circuit also rejected an interpretation of a forum-selection clause that utilized the phrase "in connection with" as applying only to breach of contract claims:

> There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, . . . with respect to the forum selection clauses, in terms of submission for "all purposes of and *in connection with*" the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir.1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270, *reh'g denied*, 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), held that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale. *Id.*, 417 U.S. at 519-20, 94 S. Ct. at 2457. We find no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the [Appellants'] contention that only allegations of contractual violations fall within the scope of the clauses.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993).

Given the similarities between the phrases "in connection with" and "in relation to," we also note that the Third Circuit has reasoned,

> In this case, we must interpret the provision in the forum selection clause that gives the English courts exclusive jurisdiction over "any dispute arising . . . in relation to" the 1990 Agreement. The ordinary meaning of the phrase "arising in relation to" is simple. To say that a dispute "arise[s] . . . in relation to" the 1990 Agreement is to say that the origin of the dispute is related to that agreement, *i.e.*, that the origin of the dispute has some "logical or causal connection" to the 1990 Agreement. *Webster's Third New International Dictionary*, 1916 (1971).

John Wyeth & Bro. Ltd. v. CIGNA Intl Corp., 119 F.3d 1070, 1074 (3d Cir. 1997). *See also Klotz v. Xerox Corp.*, No. 07 CIV 1734 (GEL), ___ F. Supp. 2d ___, & n.4, 2007 WL 3100220, at *2 & n.4 (S.D.N.Y Oct. 22, 2007) (concluding that "[p]laintiff raises no challenge to the scope of the forum selection clause, nor could she, since the expansive language of the provision-covering '[a]ny action in connection with the Plan by an Employee'-plainly encompasses her claims"; and further commenting that "[p]laintiff's state law tort and contract claims are also part of an 'action in connection with the Plan' and are covered by the clause" (footnote omitted)); *Doe v. Seacamp Assoc., Inc.*, 276 F. Supp. 2d 222, 227 (D. Mass. 2003) ("A review of the case law leads me to conclude that the tort claims, too, are covered by the forum

selection clause. The forum selection clause was worded to indicate that it governed any claim related to or arising from a contract, the subject of which were the terms and conditions of John Doe's enrollment at Seacamp."); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (finding tort and statutory claims were subject to forum-selection clause).

Turning to the instant case, we note that the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were: (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment. Based upon our review of these tort claims, we conclude that they were indeed "brought in connection with" the 1997 CSA.

All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore's declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA. While the amended complaint methodically sets out numerous details of purported pre-*force majeure* wrongful conduct, no injury resulted from any of that alleged conduct without the declaration of *force majeure* under the 1997 CSA.

For example, "Count I" of the amended complaint alleges tortious interference with existing contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants. Thus, this claim is "brought in connection with" the 1997 CSA.

Count II of the amended complaint alleged tortious interference with prospective contractual relations, again involving Wellmore, Penn Virginia and the UMWA. As with Count I, the key to these claims remains Wellmore's wrongful declaration of *force majeure*. In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey. Therefore this claim is "brought in connection with" the 1997 CSA.

Finally, Count III alleges fraudulent misrepresentation, deceit and concealment either related to the declaration of *force majeure* itself or related to subsequent negotiations between the Harman Companies and the Massey Defendants "regarding their intentions to enter into a settlement agreement with Harman in connection with the 1997 CSA." Insofar as this claim either relates directly to

the declaration of *force majeure* under the 1997 CSA, or to the parties' efforts to reach a settlement with respect to the 1997 CSA, it is "brought in connection with" the 1997 CSA.

Accordingly, because none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore's declaration of *force majeure* under the 1997 CSA, these claims are all "brought in connection with" the 1997 CSA and, as a consequence, are within the scope of the forum-selection clause contained therein.[25]

b. Are the parties involved in the suit subject to the forum-selection clause? Before the circuit court, in their response to the Massey Defendants' motion to dismiss,[26] the Harman

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25 Some courts have concluded that a forum-selection clause is applicable to tort claims only where the resolution of the claim requires interpretation of the contract. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) ("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." (citing *Weidner Communications, Inc. v. Faisal*, 671 F. Supp. 531, 537 (N.D. Ill. 1987); *Berrett v. Life Ins. Co.*, 623 F. Supp. 946, 948-49 (D. Utah 1985); *Clinton v. Janger*, 583 F. Supp. 284, 288 (N.D. Ill. 1984)). While we might agree with this proposition were we presented with a more narrowly tailored forum-selection clause applying to claims "arising under" or "arising out of the contract, we see no need for such a narrow rule in the context of a broadly worded forum-selection clause such as the one presently before us. Nevertheless, we do note that, insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful.

26 *See supra* note 24.

Companies and Mr. Caperton argued that, as strangers to the 1997 CSA, the Massey Defendants are precluded from enforcing its terms as they are not third-party beneficiaries of the contract. The Harman Companies and Mr. Caperton further argued that two of the plaintiffs to this action, Harman Development and Mr. Caperton (in his individual capacity), are not signatories to the 1997 CSA and, therefore, may not be bound by its terms. We disagree.

Other courts addressing the issue of whether non-signatories to a contract may enforce, or be subject to, a forum-selection clause have found the clauses to be enforceable under certain circumstances. One such case is *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). The *Manetti-Farrow* case involved a contract between a California corporation, Manetti-Farrow, and Gucci Parfums, an Italian corporation that was a subsidiary of another Italian corporation, Guccio Gucci, S.p.A. (hereinafter referred to as "Guccio Gucci"). The contract included a forum-selection clause that stated: "[f]or any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction." *Manetti-Farrow*, 858 F.2d at 511. Another company, Gucci America, signed a consent and ratification agreement, in which it consented to the contract between Manetti-Farrow and Gucci Parfums. Ultimately a dispute arose, and Manetti-Farrow filed suit in California alleging numerous causes of action, not only against Gucci Parfums and Gucci America, but also against the parent company, Guccio Gucci, as well as numerous officers of these companies. *Manetti-Farrow*, 858 F.2d at 511-12. Upholding the district court's dismissal based upon the forum-

selection clause, the Ninth Circuit found that a forum-selection clause was applicable to "a range of transaction participants" who were "closely related to the contractual relationship":

> Manetti-Farrow argues the forum selection clause can only apply to Gucci Parfums, which was the only defendant to sign the contract. However, "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-03 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983)). We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants.

858 F.2d at 514 n. 5.

Similarly, in *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), it was argued that two corporate plaintiffs to a lawsuit, GCM and OMI, were not parties to the contract containing the forum-selection clause (which plaintiff Hugel had signed), and therefore, were not bound by the clause. In rejecting the argument, the court relied on the companies' close relationship to the agreement and

the foreseeablity that they would be bound by the forum-selection clause:[27]

> In order to bind a non-party to a forum selection clause, the party must be "closely related" to the dispute such that it becomes "foreseeable" that it will be bound. . . . Hugel is President and Chairman of the Board of both GCM and OMI. In addition, Hugel owns 99% of the stock of GCM which, in turn, owns 100% of the stock of OMI. The alleged assurances of confidentiality were made to Hugel alone and Hugel alone decided that his corporations would participate in Lloyd's investigation.
>
> Hugel and Lloyd's contracted to settle all of their disputes in England. Although GCM and OMI were not members of Lloyd's, in the course of a dispute between Hugel and Lloyd's, Hugel alone involved his two controlled corporations and supplied information allegedly belonging to those corporations. The district court found that the corporations owned and controlled by

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[27] The contract dispute in the *Hugel* case arose after plaintiff Dieter Hugel became a member of the Corporation of Lloyd's. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993). Hugel signed a membership contract that included the forum-selection clause. *Id.* Thereafter, Lloyd's became suspicious that Hugel and GCM were involved in criminal misconduct and initiated an investigation. *Id.* Hugel cooperated with the investigation and provided confidential information pertaining to GCM and OMI. In the subsequent lawsuit, plaintiffs Hugel, GCM and OMI claimed that "they lost business as the result of Lloyd's breach of confidentiality relating to the investigation." *Id.*

> Hugel are so closely related to the dispute that they are equally bound by the forum selection clause and must sue in the same court in which Hugel agreed to sue. We hold these findings are not clearly erroneous.

999 F.2d at 209-10. Furthermore, the *Hugel* court made clear that a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party:

> Plaintiffs argue that the court must make a threshold fmding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by defmition, satisfy the "closely related" and "foreseeability" requirements, *see e.g.*, *Coastal Steel*, 709 F.2d at 203 (refusing to absolve a third-party beneficiary from the strictures of a forum selection clause which was foreseeable); *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984), a *third-party beneficiary status is not required.*

Hugel, 999 F.2d at 209-10 n.7 (emphasis added).[28]

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[28] *But see Pixel Enhancement Labs., Inc. v. McGee*, 1998 WL 518187, at *2 (D. Mass. 1998) ("As McGee is not a third party beneficiary of the License Agreement, he has no standing to assert its forum selection clause. *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) ("[T]hird party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to non signatories).").

In another case, *Great Northern Insurance Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 NAM GJD, ___ F. Supp. 2d ___, 2007 WL 2891981 (N.D.N.Y. Sept. 28, 2007), two German companies entered into a supply agreement whereby Constab Polymer-Chemie (hereinafter referred to as "Constab") would supply products used to produce photo paper to Feliz Schoeller GmbH & Co., and its subsidiaries, one of which was Schoeller-USA.___ F. Supp. 2d at ___, 2007 WL 2891981, at *1. The contract included a forum-selection clause specifying that jurisdiction of certain disputes would be in Warstein, Germany. *Id.*, ___ F. Supp. 2d at ___, 2007 WL 2891981, at *7. Constab provided defective products to Schoeller USA, and Schoeller USA, through its insurer, filed suit in California.[29] In rejecting the argument that, as non-parties to the contract Great Northern and Schoeller-USA could not enforce the forum-selection clause, the court reasoned,

> [n]either Great Northern nor [its insured] Schoeller-USA are signatories to the Agreement. However, the enforcement of the forum selection clause is clearly "forseeable" given the relationships between the parties and the basis upon which plaintiff has commenced this suit. Therefore, the Court finds that the forum selection clause may be invoked against plaintiff . . . .

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[29] Great Northern provided indemnity insurance to Schoeller-USA and, in accordance with the insurance policy, compensated Schoeller-USA for its losses resulting from the defective product and became subrogated to Schoeller-USA's rights.

___ F. Supp. 2d at ___, 2007 WL 2891981, at *8. *See also First Specialty Ins. Corp. v. Admiral Ins. Co.*, No. CV 07 408 MO, ___ F. Supp. 2d ___, ___, 2007 WL 1876516, at *3 (D. Or. June 22, 2007) ("[A] range of transaction participants, including non-parties, should be bound by forum selection clauses of an underlying agreement if their conduct is 'closely related to the contractual relationship.' . . . The fact that either one or both parties was not a signatory to the underlying contract is not dispositive." (internal citations omitted)); *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1434 (N.D. Cal. 1997) ("It is well established that 'a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.' . . . [T]he conduct of GTSI and Mr. Fuller are closely related [to] the contractual relationship between Mr. Graham and TPI, and the forum selection clause applies to both GTSI and Mr. Fuller in spite of the fact that they are not signatories to the PSA." (internal citations omitted)); *Deloitte & Touche v. Gencor Indus., Inc.*, 929 So. 2d 678, 683 (Fla. Dist. Ct. App. 2006) ("The trial court found that this [forum-selection] clause could not be enforced against Gencor because Gencor was not a party to the contract. In other contexts, however, Florida courts have enforced contract terms, including forum selection clauses, against non-signatories. *See, e.g.*, *World Vacation Travel, S.A. v. Brooker*, 799 So. 2d 410, 412 (Fla. Dist. Ct. App. 2001) (forum-selection clause against non-signatory proper where the claims are directly out of the agreement and the commercial relationship of the parties); *Tuttle's Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So. 2d 873, 873-74 (Fla. 2d DCA 1992) (recognizing that a reasonable forum-selection clause would be enforced

against a non-signatory). This is particularly true where, as here, there exists a close relationship between the non-signatory and signatory and the interests of the non-signatory are derivative of the interests of the signatory. *See, e.g., XR Co. v. Block & Balestri, P.C.*, 44 F. Supp. 2d 1296, 1299 (S.D. Fla. 1999) (enforcing forum-selection clause against sole shareholder of contracting corporation where the shareholder's interests in the contract were derivative of the contracting party and the contract inured to the non-signatory's benefit)." (footnote omitted)); *Dogmoch Int'l. Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397, (N.Y. App. Div. 2003) ("Although defendant was a nonsignatory to the account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause given the close relationship between itself and its subsidiary . . . .").

Based upon the foregoing, we now hold that a plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract. We further hold that a defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract.

Applying the foregoing holdings to the facts of the instant case, we first note that, as to the plaintiffs, Sovereign and Harman Mining were signatories to the 1997 CSA, and Harman Development and Mr. Caperton, in his individual

capacity,[30] were not. However, Sovereign and Harman are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Under these facts, any claim brought by Mr. Caperton and Harman Development in connection with the 1997 CSA are closely related to the contract and are, therefore, subject to the forum-selection clause contained therein. As we determined in the preceding section of this opinion, the three factually-supported claims asserted in the first amended complaint[31] all flowed from the wrongful declaration of *force majeure* under the 1997 CSA, and were brought in connection with that contract. Accordingly, we find that Mr. Caperton and Harman Development are bound by the forum-selection clause of the 1997 CSA.

Turning to the Massey Defendants, we note that none of them were signatories to the 1997 CSA. However, Defendant Massey subsequently became the parent company to Wellmore, who is a signatory of the 1997 CSA, and Wellmore was Massey's subsidiary at the time it declared *force majeure*.[32]

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[30] We note that Mr. Caperton did sign the 1997 CSA as president of Sovereign.

[31] As we noted in the preceding section of this opinion, the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the first amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Therefore, we limit our consideration to only those three claims that ultimately went to the jury.

[32] The 1997 CSA was executed in March 1997, and was made retroactively effective to January 1, 1997. Massey acquired

All the other Massey Defendants are also subsidiaries of Massey. The complaint plainly alleges that Massey, along with all its subsidiaries who are defendants in this action, exercised "domination and control" over Wellmore and directed Wellmore to wrongfully declare *force majeure*. Because, as we previously determined, all of the claims in this action flow directly from the declaration of *force majeure*, and the complaint alleges that the Massey Defendants controlled Wellmore's declaration of *force majeure*, the complaint plainly demonstrates that the claims against the Massey Defendants are closely related to the contract. Therefore, we find that the Massey Defendants are entitled to enforce the forum-selection clause of the 1997 CSA.

4. Rebuttal. Because the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in this dispute, it is presumptively enforceable. Thus, the final step to our analysis is to ascertain whether the Harman Companies and Mr. Caperton have rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

In this regard, it has been recognized that

[Footnote continued from previous page]
Wellmore on July 31, 1997, when it purchased United Coal Corporation and United's subsidiary Wellmore. Wellmore declared *force majeure* on December 1, 1997.

> [m]andatory choice of forum clauses will be enforced unless they are "unreasonable." *Davis Media Group*, 302 F. Supp. 2d at 466 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10, 92 S. Ct. 1907). "Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996).

Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631-32 (D. Md. 2006) (footnotes omitted). Moreover,

> [a] party trying to defeat a mandatory choice of forum clause bears a "heavy burden." *See Davis Media Group v. Best Western Int'l, Inc.*, 302 F. Supp. 2d, 464, 469-70 (D. Md. 2004); *see also, e.g., Sarmiento v. BMG Entm't*, 326 F. Supp. 2d 1108, 1111 (C.D. Cal. 2003) ("[I]f the resisting party fails to come forward with anything beyond general and conclusory allegations of fraud and inconvenience, the court must uphold the agreement").

Id. at 631 n.1. In this case, the Harman Companies and Mr. Caperton have not argued, either below or before this Court, that enforcement of the forum-

selection clause of the 1997 CSA would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the forum-selection clause should have been enforced by the circuit court, and that court's failure to grant the Massey Defendants' motion to dismiss based upon the forum-selection clause was an abuse of discretion.[33]

B. Res Judicata

Although the forum-selection clause is dispositive of this case, we further conclude that, assuming *arguendo* the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata.

In addressing this issue, we are called upon to decide the res judicata effect of the Virginia judgment on the instant West Virginia proceeding. We have previously held that "[u]nder Article IV, Section 1, of the Constitution of the United States, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this State." Syl. pt. 1, *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968). Further, "[b]y virtue of the full faith and credit clause of the Constitution of the United States, a judgment of a court of another state

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[33] We would be remiss if we did not acknowledge that the motivating factor for the Harman Companies and Mr. Caperton to bring the tort claims in West Virginia may have been due to the fact that Virginia has a cap on punitive damages and West Virginia does not. *See* Va. Code § 8.01-38.1 (1987) ("In no event shall the total amount awarded for punitive damages exceed $350,000.00). Virginia also does not allow punitive damages for contract claims. *See Kamlar Corp. v. Haley*, 224 Va. 699, 705, 299 S.E.2d 514, 517 (Va. 1983).

has the same force and effect in this State as it has in the state in which it was pronounced." Syl. pt. 3, *Id.* "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that '[t]he validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered.'" *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 474, 513 S.E.2d 692, 701 (1998) (quoting 50 C.J.S. § 969, at 563). Further, "the full faith and credit clause generally requires the courts of this State to give [a foreign] judgment at least the res judicata effect which it would be accorded by [the foreign] courts." *Jordache Enterprises*, 204 W. Va. at 476, 513 S.E.2d at 703. *See also Martin v. SAIF Corp.*, 167 P.3d 916, 918-19 (Mont. 2007) ("Full faith and credit generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." (internal quotations and citation omitted)).

Before discussing the specific elements that must be established in order for the preclusive effect of res judicata to apply under Virginia law, we must first address a preliminary issue. Under the laws of Virginia, "a judgment is not final for the purposes of res judicata . . . when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992). In the instant proceeding it appears that a trial court judgment in the Virginia proceeding was entered on May 7, 2001. Subsequently, on April 1, 2002, Massey filed a motion for summary judgment with the West Virginia circuit court, arguing that principles of res judicata required dismissal of the West Virginia case

as a result of the judgment in the Virginia case. On June 17, 2002, the circuit court denied the motion. The circuit court was correct in denying summary judgment on res judicata grounds because, at the time Massey filed its motion and the circuit court decided the matter, the Virginia judgment was being appealed by Wellmore. As we have pointed out, under Virginia law "a judgment is not final for *res judicata* purposes if it is being appealed." *CDM Enters., Inc. v. Commonwealth/Manufactured Housing Bd.*, 32 Va. App. 702, 709, 530 S.E.2d 441, 445 (2000) (emphasis in original).

The Virginia judgment did not become final for purposes of res judicata until September 13, 2002, when the Supreme Court of Virginia dismissed Wellmore's appeal. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002) (dismissing appeal). Consequently, the issue we now confront is whether or not this Court may recognize the finality of the Virginia judgment, for purposes of addressing the res judicata issue on appeal. A case squarely addressing this issue is *Aronow v. Lacroix*, 268 Cal. Rptr. 866, 219 Cal. App. 3d 1039 (1990).

The facts of *Aronow* involved two separate lawsuits filed by different plaintiffs against the same law firm for malicious prosecution.[34] One lawsuit was filed by Dr. Ann Fitzsimmons, and the other was filed by Betty Aronow. In the case brought by Dr. Fitzsimmons, a judgment was rendered in favor of the law firm on January 27, 1981. However, as a

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[34] Both plaintiffs had been sued by the law firm in a previous action.

result of an appeal, the case was not finally disposed of until June 24, 1987. The action brought by Ms. Aronow went to trial on October 5, 1982. Prior to trial the law firm raised the issue of res judicata, but the trial court found that res judicata did not apply because Dr. Fitzsimmons' case was pending an appeal and therefore had not become final. A jury ultimately returned a verdict in favor of Ms. Aronow and awarded her damages. The law firm appealed the judgment. While the case was pending on appeal, Dr. Fitzsimmons' case became final after an appellate court rendered a decision affirming the verdict in favor of the law firm. As a result of Dr. Fitzsimmons' case becoming final, the law firm raised the issue of res judicata in the appeal of Ms. Aronow's case. The appellate court in *Aronow* found that the issue could be raised on appeal:

> First, we consider the question of a final judgment on the merits. At the time the court trial of [Ms. Aronow] began, [Dr. Fitzsimmons' case] was on appeal, so there was no final judgment . . . on which [the law firm] could rely to raise a res judicata defense in the trial court. . . . However, . . . our affirmance of the judgment in [the law firm's] favor [became] final, . . . on September 28, 1987, while the present appeal was pending.
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> Under these circumstances, [the law firm] now ha[s] a final judgment on which to base a claim of res judicata, and they can raise the issue on appeal. Although normally the res judicata effect of a prior judgment must be pleaded and proven at trial, when the judgment becomes final during the

> pendency of an appeal in another action, the first final judgment may be brought to the attention of the appellate court in which the appeal is pending and may there be relied on as res judicata.

Aronow, 268 Cal. Rptr. at 870, 219 Cal. App. 3d at 1046 (internal quotations and citations omitted) (footnote omitted). The appellate Court in *Aronow* went on to analyze the case under res judicata principles and found that the doctrine applied "to preclude [Ms.] Aronow from a judgment in her favor in her own case." *Aronow*, 268 Cal. Rptr. at 875, 219 Cal. App. 3d at 1053.

In accordance with *Aronow*, we now hold that a party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal. Although our holding on this issue permits us to exercise our inherent authority to consider Massey's res judicata argument, we believe the decisions of the Supreme Court of Virginia demonstrate that that court would also exercise its inherent authority to address the issue under the facts presented.

The decision by the Supreme Court of Virginia in *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (Va. 1941), is instructive of how we believe that court would respond to the issue of res judicata raised in this case. The facts of *Ward* show that James R. Ward drove his car into the rear of a tractor being driven by Henry Harper. The tractor was owned by Sidney Charlton. Mr. Ward sued Mr. Charlton and, in a separate action, Mr. Harper sued Mr. Ward. Mr. Ward also brought a counter-claim against Mr. Harper.

In Mr. Ward's suit against Mr. Charlton, a jury returned a verdict in favor of Mr. Ward. However, the trial court set aside the verdict and granted judgment to Mr. Charlton. Mr. Ward appealed. While Mr. Ward's appeal was pending, a jury decided the case brought by Mr. Harper. In that case, the jury determined Mr. Harper was not entitled to recover from Mr. Ward, and Mr. Ward was not entitled to recover from Mr. Harper on the counterclaim.

As a result of the disposition of the Harper-Ward lawsuit, Mr. Charlton asked the Supreme Court of Virginia to dismiss Mr. Ward's appeal on res judicata grounds. Mr. Charlton took the position "that since it has been adjudicated by a court of competent jurisdiction that Ward . . . can not recover of Harper, the original tort feasor, *a fortiori* Ward can not recover of Harper's master, Charlton, whose liability, if any, depends entirely upon the liability of Harper, under the doctrine of respondeat superior." *Ward*, 177 Va. at 106, 12 S.E.2d at 792. In response, Mr. Ward argued, among other things, that Mr. Charlton could not raise the defense of res judicata for the first time on appeal. The Supreme Court of Virginia disagreed:

> The present [appeal] presents the sole question as to whether Ward is entitled to a judgment against Charlton by reason of the alleged negligent acts of Charlton's servant, Harper. The petition for a writ of error prays that the verdict which Ward obtained against Charlton and which the trial court set aside, be restored, and that this court enter a final judgment on said verdict against Charlton. It conclusively appears from extrinsic

> evidence, which is not controverted, that subsequent to the closing of the record in the instant case a court of competent jurisdiction has determined that Ward is not entitled to recover the judgment which he here seeks.[35]
>
> Must this court shut its eyes to these admitted facts and sagely proceed to consider an issue which has already been decided by a court of competent jurisdiction, and possibly enter a final judgment directly in conflict with that already rendered? We think not. In our opinion this court has the jurisdiction and it is its duty to examine this extrinsic evidence in determining whether it will proceed to hear the pending matter or dismiss it because the issue between the parties has been settled.
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> . . . .
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> It is true, as argued by the learned counsel for [Ward], that an appellate court in reviewing the record of the proceedings in the court below will not entertain the defense of res judicata if it was available and was not made below. This is so because the defense is an affirmative one and if not asserted below is deemed to have been waived. . . .

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35 It should be pointed out that, at the time of this case, the Supreme Court of Virginia had not adopted the rule that a judgment is not final for the purposes of res judicata when it is being appealed. This rule was first adopted in 1992, in *Faison v. Hudson*, 417 S.E.2d 302 (Va. 1992).

> But this principle does not apply to the instant case where the defense was not available and could not have been asserted during the trial below.
>
> . . . .
>
> The doctrine of res judicata or estoppel by judgment is based on public policy. . . . It proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. . . .
>
> The doctrine is firmly established in our jurisprudence and should be maintained where applicable. . . .
>
> Here it has been brought to our attention by undisputed evidence that since the trial below another court of competent jurisdiction has finally adjudicated that the plaintiff in error, Ward, is not entitled to a judgment against Charlton, the defendant in error. Hence, the plaintiff in error is estopped to ask this court to review the record before it and to enter in his favor a judgment. . . .

Ward, 177 Va. at 110-15, 12 S.E.2d at 793-96 (internal quotations and citations omitted) (footnote added).

Clearly under the decision in *Ward*, the Supreme Court of Virginia would address the issue of res judicata presented in this case, even though the doctrine did not become ripe until the case was presented on appeal. Consequently, we find that, although the circuit court was correct in denying summary judgment to Massey on res judicata grounds because the Virginia judgment was pending appeal, this Court may now address the issue anew because a final judgment was rendered in the Virginia case by the time this appeal was prosecuted.

The Supreme Court of Virginia has described the doctrine of res judicata, and its purpose, as follows:

> the rationale for this judicially created doctrine [is that] it "rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties. . . . The doctrine prevents 'relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.'"

City of Virginia Beach v. Harris, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000) (quoting *Bill Greever Corp. v. Tazewell Nat'l Bank*, 256 Va. 250, 254, 504 S.E.2d 854, 856 (1998) (additional citation omitted)). *See also Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992) ("The bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." (citing *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974); *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493, 495 (1988); *Brown*

v. Haley, 233 Va. 210, 215, 355 S.E.2d 563, 567 (1987); and *Worrie v. Boze*, 198 Va. 533, 537-38, 95 S.E.2d 192, 196-97 (1956), *aff'd on reh'g*, 198 Va. 891, 96 S.E.2d 799 (1957))).

With respect to the application of res judicata, the Virginia Court has been consistent in holding that

> [f]our elements must be present before *res judicata* can be asserted to bar a subsequent proceeding: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). *See also Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

Smith v. Ware, 244 Va. 374, 376, 421 S.E.2d 444, 445. *See also State Water Control Bd. v. Smithfield Foods, Inc.* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001) (same); *Balbir Brar Assoc., Inc. v. Consolidated Trading and Servs. Corp.*, 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996) (same). We will address each of these elements in turn.

1. Identity of the remedies sought. The Harman Companies argue that because the Virginia proceeding awarded damages for breach of contract, while the instant action awarded damages in tort, the remedies sought in these two actions are not the same. We disagree.

The Supreme Court of Virginia has not squarely defined what is meant by "identity of the remedies sought" for purposes of the res judicata test. *Ware*, 244 Va. at 376, 421 S.E.2d at 445. However, in the

Ware case the court addressed the issue of whether there was identity of remedies, and concluded that because the earlier action sought relief in the court of law, while the latter action sought equitable relief in the court of chancery, there was no identity of remedy: "Mrs. Smith, in her motion for judgment for unlawful detainer, sought the remedy of possession and damages. . . . Mrs. Smith, in her bill of complaint, does not seek possession of the property. Rather, she seeks a commutation of her dower interest, which is a different remedy." *Ware*, 244 Va. at 376-77, 421 S.E.2d 445-46.[36] Thus, it appears that the "remedy" element of res judicata refers, at least in significant part, to the distinction between legal and equitable remedies. The legal definition of the term "remedy" supports this view. *See, e.g.*, *Black's Law Dictionary* 1296 (7th ed. 1999) (defining "remedy" as '[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief").

Our conclusion is further supported by the opinion in *Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, 1996 WL 1065553, at *1 (Va. Cir. Ct. 1996), wherein the Circuit Court of Virginia explained the concept in this way:

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[36] Until January 2006, Virginia continued to separately recognize actions at law and actions in chancery. However, that distinction was abolished as of January 1, 2006. *See Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 517 n.6, 643 S.E.2d 136, 145 n.6 (2007) ("As of January 1, 2006, Virginia abolished the procedural distinctions between actions at law and suits in chancery.").

At first brush [*Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986),] appears to a retrenchment in the scope of the doctrine of res judicata by its addition of the requirement of "identify of remedies," because if remedy were synonymous with "right of action," the implication is that the aggrieved party, confronted with a judgment for the defendant, may simply successively file actions based on different remedies or rights of action until he receives a favorable verdict. If this were true, the doctrine of Res Judicata would be substantially emasculated.

Black's Law Dictionary (5th ed. 1979) defines remedy as "the rights given to a party by law or by contract which that party may exercise upon a default by the other party, or upon the commission of a wrong (a tort) by another party," so remedy in this context is actually consonant with the broader concept of "cause of action." Moreover, the Supreme Court in *Ware v. Smith*, [244 Va. 374, 421 S.E.2d 444 (1992)], noted that the causes of action were different and relied upon *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974), which clearly held:

> Res judicata-bar, is the particular preclusive effect commonly meant by the use of the term "res judicata." A valid, personal judgment on the merits in favor of a defendant bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. *See*

> Restatement of Judgments 47, 62, 83 (1942).
>
> Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action.
>
> *The ostensibly inconsistent rule of this case derives from the fact that Virginia still recognizes a distinction between law and equity, and this legal relic affects the court's res judicata decisions.* In *Ware v. Smith*, *supra*; *Brown v. Haley*, 233 Va. 210, 219, 355 S.E.2d 563 (1987) (equitable claim for easement arose from different transaction and could not be asserted in earlier ejectment action at law between the same parties); and *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (prior chancery suit for injunction does not bar later suit for monetary damages, the court was confronted by later cases being filed on a different side of the court, because of the dichotomy between law and equity[]). . . .

1996 WL 1065553, at *10 (emphasis added).

With respect to the case presently before us, both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA. Accordingly, the identity of remedy element of Virginia's res judicata test has been met.

2. Identity of the cause of action. The Harman Companies contend that the breach of contract cause of action litigated in Virginia differs

from the tort claims asserted in the instant action. We disagree.

As demonstrated by Rule 1:6 of the Rules of the Supreme Court of Virginia, Virginia applies the transactional approach to the element of res judicata requiring identity of the cause of action:[37]

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil

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[37] In 2003, the Supreme Court of Virginia handed down an opinion that significantly changed how that court defined the term "cause of action." *See Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003) (concluding that fraud claim did not bar subsequent breach of contract claim involving same deed of trust notes, and commenting that "[t]he mere fact that some evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of res judicata, mean that plaintiff only has one cause of action. Evidence of defendants' failure to satisfy the deed of trust notes does not prove that defendants made false representations of the values of the real properties intentionally and knowingly, with the intent to mislead plaintiff. Evidence of defendants' failure to satisfy the deed of trust notes does not establish plaintiff's reliance upon defendants' alleged misrepresentations."). However, in 2006 the Supreme Court of Virginia adopted Rule 1:6, which superseded the court's earlier decision in *Davis*. *See Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (observing that the transactional approach adopted by Rule 1:6 was promulgated to supersede the holding in *Davis*). With the adoption of Rule 1:6, Virginia has returned to the transactional approach previously applied in Virginia when addressing the element of res judicata requiring identity of the cause of action.

> action against the same opposing party or parties *on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought*. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading.

(Emphasis added). *See also Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (noting that Rule 1:6 represented the transactional approach). The transactional approach has been explained as follows:

> As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, 24 for purposes of defining "cause of action." The importance of understanding the broad concept of "cause of action" is essential to understanding the application of res judicata. One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, *if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata*. "There can be no right of action until there is

a cause of action." *Stone v. Ethan Alan*, 232 Va. 365, 368-369, 350 S.E.2d 629 (1986), citing *Caudill v. Wise Rambler*, 210 Va. 11, 13 168 S.E.2d 257, 259 (1969). However, as broad as the application of the doctrine of res judicata is, it applies only to rights of action which have accrued from the cause of action and could have been asserted in the proceeding upon which the plea is based. As the Supreme Court of Virginia noted in *Southern. R. Co. v. Wash. & C. R. Co.*, 102 Va. 483, 491, 46 S.E. 784 (1904):

> [R]es judicata applies, except in special cases, not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig & Co.*, 93 Va. 603, 25 S.E. 894, and authorities cited. But it cannot be applied to a matter not adjudicated in a former action and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former or their privies, if the causes of action are not the same. (cites omitted)

Cherokee Corp., 1996 WL 1065553, at *8. *See also Allstar Towing, Inc. v. City of Alexandria*, 231 Va.

421, 425, 344 S.E.2d 903, 905-06 (1986) (commenting that "[f]or the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen out of a definable factual transaction,'" and concluding that second action was not barred by first because "the facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits" (internal citation omitted)).

Notably, the transactional approach of Rule 1:6 applies to "any claim or cause of action that arises from that same conduct, transaction or occurrence, *whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit.*" Rule 1:6 (emphasis added). Stated another way,

> [u]nder settled principles, the "effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which *properly belonged to the subject of litigation* and which the parties, by the exercise of reasonable diligence, *might have raised at the time.*" *Smith v. Holland*, 124 Va. 663, 666, 98 S.E. 676, 676 (1919) (emphasis added). This could-have-litigated-should-have-litigated principle applies to . . . the broader transactional approach adopted by Rule 1:6 . . . .

Virginia Imports, 50 Va. App. at 410 n.6, 650 S.E.2d at 561 n.6.

Turning to the case at bar, although the Virginia proceeding addressed contract claims, while the instant proceeding addressed tort claims, this

distinction is of no moment. Both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from the same "conduct, transaction or occurrence," namely the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants. Thus, the tort claims asserted in this action arise from the same transactional facts as the Virginia proceeding and should have been asserted in that proceeding.

3. Identity of the parties. Mr. Caperton and Harman Development were not parties to the Virginia action, and neither were any of the Massey Defendants named in the instant suit. The Harman Companies argue that there is no identity of the parties as there is no privity between the Massey Defendants and Wellmore. We disagree, finding there is identity of the parties between the Virginia proceeding and the instant proceeding under the doctrine of privity.

Pursuant to Virginia law,

> [t]he doctrine of *res judicata* applies not only to the actual parties in a case but also to those in privity with them. *See City of Virginia Beach v. Harris*, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000). In other words, res judicata applies to anyone "'so identified in interest with [a party] that he represents the same legal right, precisely the same question, particular controversy, or issue.'" *Johnson*, 7 Va. App. at 618, 376 S.E.2d at 788 (citation omitted).

CDM Enters., Inc. v. Commonwealth/Manufactured Housing Bd., 32 Va. App. 702, 710, 530 S.E.2d 441,

445 (2000). One Virginia court has explained the requirement for the identity of parties in this way:

> "One of the fundamental prerequisites to the application of the doctrine of *res judicata* is that there must be an identity of the parties between the present suit and prior litigation asserted as a bar. A party to the present suit, to be barred by the doctrine, must have been a party to the prior litigation, or represented by another so identified in interest that he represents the same legal right." *Dotson*, 232 Va. at 404-405, 350 S.E.2d at 644.
>
> There is no fixed definition of privity that automatically can be applied in all cases involving *res judicata* issues. While privity generally involves a party so identified in interest with another that he represents the same legal right, a determination of . . . who are privies requires a careful examination of the circumstances of each case.

Nero v. Ferris, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981).

In *Patterson v. Saunders*, the Supreme Court stated:

> It is generally held that "'privity' means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights, and the term 'privy,' when applied to a judgment or decree refers to

> one whose interest has been legally represented at the trial."
>
> 194 Va. at 613, 74 S.E.2d at 208 (citation omitted).

Commonwealth ex rel. Gray v. Johnson, 7 Va. App. 614, 619, 376 S.E.2d 787, 789 (1989).

Turning to the instant case, we find that the parties to the Virginia proceeding "are so identified in interest" with the parties to the instant proceeding that they "represent the same legal right[s]." *CDM Enters., Inc.*, 32 Va. App. at 710, 530 S.E.2d at 445 (internal quotations and citations omitted). In the Virginia proceeding, Harman Mining and Sovereign sued Wellmore for breach of contract related to the wrongful declaration of *force majeure* under the 1997 CSA. It bears reiterating that all of the harm that has been claimed by Mr. Caperton and the Harman Companies in the instant action has stemmed directly from that wrongful declaration of *force majeure* under the 1997 CSA. Because the question of whether the declaration of *force majeure* was wrongful was the exact issue addressed in the Virginia proceeding, the interests of the various parties to the instant suit, which also depends upon the propriety of the declaration of *force majeure*, is directly aligned with the interests of the related corporate entities who participated in the Virginia action.

Moreover, it has been recognized that a parent company is in privity with its subsidiary. *See Mullins v. Daily New Leader*, 2001 WL 1772679, at *2 (Va. Cir. Ct. 2001) ("The Daily News Leader and Gannett Co., Inc., are in privity as Gannett is the parent company of the Daily News Leader."). Thus, Harman Development is plainly in privity with its

susidiaries, Harman Mining and Sovereign, who were parties to the Virginia action. Mr. Caperton is also in privity with Harman Mining and Sovereign to the extent that he signed the 1997 CSA in his capacity as president of Sovereign, and insofar as Harman Mining and Sovereign are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Likewise, A.T. Massey Coal Company is in privity with its subsidiary Wellmore, as are the remaining Massey Defendants, who are also subsidiaries of Massey and sister corporations to Wellmore.

4. Identity of the quality of the persons for or against whom the claim is made. As previously indicated, for purposes of res judicata Virginia requires a determination be made of the identity of the quality of the persons for or against whom the claim was made. As explained by a Virginia trial court, "[t]he 'identity of quality' element is a requirement that the parties in conflict appear in the identical capacities or on 'the same side of the versus' in both proceedings." *Winchester Homes, Inc. v. Hoover Universal, Inc.*, 1994 WL 1031408, at *2 (Va. Cir. Ct. 1994) (citing *Greene v. Warrenton Prod. Credit Ass'n*, 223 Va. 463, 291 S.E.2d 209 (1982)). The facts of the instant case clearly establish that this element has been met. The original plaintiffs in the Virginia suit are plaintiffs in the West Virginia proceeding, and they sued in the same capacity in both litigations. None of the Massey Defendants in the instant proceeding was a plaintiff in the Virginia proceeding. *See Byrum v. Ames & Webb, Inc.*, 196 Va. 597, 85 S.E.2d 364 (1955) (finding that prior litigation was not res judicata to subsequent litigation because plaintiff and defendant were both nonadversarial defendants

in the prior litigation); *Ezrin v. Stack*, 281 F. Supp. 2d 67 (D.D.C. 2003) (applying Virginia law to find that res judicata applied where both parties were on opposite sides of the "v." in prior litigation).

5. Preclusive Effect of Res Judiciata. Because the four elements of res judicata have been met in this case, as demonstrated above, we conclude that the instant action is barred.

IV.

CONCLUSION

For the reasons stated in the body of this opinion, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing this case against A.T. Massey Coal Company and its subsidiaries with prejudice.

Reversed and remanded.

No. 33350 *Hugh M Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

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Benjamin, J., concurring:

Roscoe Pound offered the following pertinent comments as to a judge's responsibility when dissenting:

> The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

Roscoe Pound, *Cacoethes Dissentiendi*: The Heated Judicial Dissent, 39 A.B.A. J. 794, 795 (1953). There is an important difference between a thoughtful, well-reasoned separate opinion and one which is grounded in the political manipulation of legal doctrine; and in the case of ensuring a stable,

predictable and fair judicial system, that difference matters. Judges who use their opinions simply as sensationalistic bombast by which to convey partisan agendas or who pander to emotion rather than legal reason do a disservice to the rule of law and to the institution they serve.

It is a testament to the strength of our justice system that judges may disagree and do so openly in separate opinions. A well-reasoned and legally sound separate opinion carries with it the opportunity for pointing out differences with the opinions of the other members of the court without undermining public confidence in the judiciary. Hon. Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L.Rev. 1185, 1196 (1992). By furthering positive progress in the development of law, a well-honed opinion serves as an invaluable instructional tool to judges, lawyers, legal scholars, law students and even to a judge's colleagues. "[T]he effective judge . . . strives to persuade, and not to pontificate. [He] speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against . . . [his] own colleagues." *Id.* at 1186 (internal quotations omitted). A separate opinion should never "generate more heat than light", but rather should "'stand on its own footing', . . . spell[ing] out differences without jeopardizing collegiality or public respect for and confidence in the judiciary." *Id.* at 1194, 1196 (internal quotations omitted).

It is difficult to respond to my colleague Justice Starcher's dissenting opinion with legal arguments since Justice Starcher identifies no legal support for his dissent. I would observe that emotion-laden verbiage which could easily be perceived as showing an apparent grudge or personal animosity should

never serve as the basis for a separate opinion at the appellate level.

Because the majority decision possesses such a deep strength of legal authority, I do not believe that either of the dissenting opinions in any way weaken the authority of the Court's decision. I believe the dissenting opinions lack logical rigor and legal support. By baiting emotions, the dissents adopt a "political voice" rather than a "judicial voice." Resorts to emotions and sensationalism generally betray the lack of a cogent legal basis for one's criticism.

With due respect to my dissenting colleagues, this case does not present a close call on the basis of the rule of law. It simply does not. In this regard, I will focus on two particular aspects of this case. First, Virginia law supports applying res judicata in circumstances where both tort and contract claims are asserted. Second, the majority opinion correctly establishes that the appellate standard of review for "the applicability and enforceability of a forum-selection clause is *de novo*." Syl. pt. 2, maj. op.

1. Virginia law supports applying res judicata to cases involving both tort and contract causes of action. In his dissenting opinion, Justice Albright asserts that the instant action is not barred by res judicata because, under Virginia law, a plaintiff is not required to bring contract and tort causes of action in the same law suit. This reasoning is flawed. Virginia has traditionally applied the transactional approach to the identity of the "cause of action" element of the test for applying the doctrine of res judicata:

> The Virginia Supreme Court applies the . . . transactional analysis in considering the

> scope of a transaction for the application of res judicata .... In *Trout v. Commonwealth Transp. Commissioner*, 241 Va. 69, 73, 400 S.E.2d 172 (1991), the Supreme discussed this broad transactional concept:
>
> > An "action" and a "cause of action" are quite different. "Action" is defined by Code § 8.01-2, as noted above.[1] We define "cause of action" in *Roller v. Basic Construction Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989), as "a set of operative facts which under the substantive law, may give rise to a right of action."
>
> Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, § 24 for purposes of defining "cause of action." One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.

Lake Holiday Country Club, Inc. v. Teets, Nos. 00-44, 00-46 & 00-47, 00-70, 2001 WL 34037926, at *7 (Va. Cir. Ct. 2001).

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[1] Pursuant to Va. Code Ann. § 8.01-2, "'Action' and 'suit' may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts."

In the 2003 case of *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003), the Supreme Court of Virginia departed from the transactional approach. In *Davis*, the court was asked to decide whether a contract claim was barred by the doctrine of res judicata due to an earlier tort action. The *Davis* court applied a "same evidence" test, stating that "' [t]he test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim.'" *Davis*, 265 Va. at 167, 576 S.E.2d at 507. Ultimately, the court concluded that because the contract claim required different proof than the earlier tort action, it was *not* barred by res judicata. Clearly, the *Davis* court had to reject the transactional approach, in favor of the "same evidence" test, in order to find the contract claim was *not* barred by res judicata. However, the significance of the *Davis* case lies not it its conclusions, but in the fact that its reasoning was subsequently rejected by the Supreme Court of Virginia when that court adopted Rule 1:6 of the Rules of the Supreme Court of Virginia and thereby returned to the transactional approach previously applied in Virginia.[2] Thus, the *Davis* opinion has

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[2] Indeed, Justice Albright's reasoning is undermined by the plain language of Rule 1:6, which bars a subsequent claim that arises from the same conduct that has been involved in an earlier litigation, regardless of whether the claim was actually asserted in the earlier suit:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties *on any claim or cause of action that*

been viewed as a departure from the traditional res judicata law of Virginia and has been superceded by judicial rule. *See Virginia Imps., Ltd. v. Kirin Brewery of Am., LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (declaring that Rule 1:6 was promulgated to supersede the holding in *Davis*). As the majority opinion correctly notes, under the transactional approach that is applied pursuant to Virginia law, because the claims asserted in the instant action arise from the same operative set of facts, the Boone County action is barred by res judicata.

2. The proper standard for appellate review of forum selection clauses is *de novo*. Justice Albright also finds fault with the de novo standard of review set out by the majority opinion. Again, he is simply wrong. To the extent that a determination of the applicability of a forum selection clause may require this Court to review factual determinations made by a circuit court, our review of those specific determinations would be for "plain error." *See* Syl. pt. 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("[W]e review the circuit court's underlying factual findings under a clearly erroneous standard."). Nevertheless, this Court often applies multi-faceted standards of review. Thus, while

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[Footnote continued from previous page]

> *arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. . . .*

certain elements of an analysis, should they exist, might require deferential scrutiny, our overarching review of the general "applicability and enforceability" of a forum-selection clause is *de novo*." Syl. pt. 2, maj. op. *See, also, Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*. In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff. Contract interpretation as a question of law is also reviewed *de novo* on appeal." (internal citations omitted)); *Cowatch v. Sym-Tech Inc.*, No. 07-2582, 2007 WL 3257238, at *1 (3d Cir. 2007) ("Our review of the District Court's construction of the forum selection clause is plenary." (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216 (3d Cir.1991)); *Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir. 2007) ("The district court's order granting Adagen's Rule 12(b)(3) motion for improper venue based on the contractual forum-selection clause is subject to de novo review." (citation omitted)); Calix-Chacon v. Global Int'l Marine, Inc., 493 F.3d 507, 510 (5th Cir. 2007) ("[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law de novo." (quoting *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002)); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) ("We also note that 'the enforceability of a forum selection clause is a question of law that we review de novo.'" (quoting *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir. 997)); *American Soda,*

LLP v. US. Filter Wastewater Group, Inc., 428 F.3d 921, 925 (10th Cir. 2005) ("We review the enforceability of a forum selection clause de novo.) (citing *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir.2002)); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (1st Cir. 2001) ("We review a district court's dismissal based on a forum-selection clause de novo."); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997) ("In the case at hand, neither party challenges the validity of the forum selection clause; rather, they contest the specific meaning of the language used in the forum selection clause. . . . [W]e conclude that de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause. ."). In the instant case, the forum selection clause was reviewed in the context of a motion to dismiss. In this context, there simply were no factual determinations made by the circuit court that required deferential review.

For these reasons, I concur in the majority opinion.

No. 33350 *Hugh M Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

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Starcher, J., dissenting:

The majority's opinion is morally and legally wrong.

The majority opinion is morally wrong because it steals more than $60 million dollars from a man who was the victim of a deliberate, illegal scheme to destroy his business. The majority opinion is legally wrong because it uses erroneous legal reasoning to justify an immoral result.

Make no mistake — a West Virginia jury heard from all the witnesses for both sides, and decided that Mr. Don Blankenship directed an illegal scheme to break Mr. Hugh Caperton's business. No one says that the jury was wrongly instructed. No one says they didn't hear all the evidence. In fact, the majority opinion concedes, "the facts of this case demonstrate that Massey's conduct warranted the

type of judgment rendered in this case." Yes, that's right, the majority of the members of this Court says that the Boone County jury's verdict was fully justified! Therefore, in this aspect of the case, our Court's opinion is unanimous.

Let's not forget why the jury's verdict was justified: the jurors looked Mr. Blankenship in the eye and concluded that he was lying, and that Mr. Caperton was telling the truth.

The majority opinion says: "That doesn't matter" – it all should have been handled in Virginia. To which argument, one must respond: "Horse puckey!"

The Virginia case was about a single narrow contract issue. There was nothing in the Virginia case about Mr. Blankenship's grand scheme to crush Mr. Caperton and his business. According to the jury's findings, that scheme was *hatched in* West Virginia and *carried out* in West Virginia. Mr. Caperton had every right to try his case in West Virginia – and he did, and he won.

Now three members of this Court have ruled that even though it is a *fact* that Don Blankenship illegally took over $60 million dollars from Hugh Caperton – he can get away with it scot-free. Talk about crime in the suites!

Finally, I would be remiss if I did not briefly speak to the multiple claims made by the Massey parties that I should remove myself from the consideration of the instant case because I have publicly decried the one-man smear tactics that Mr. Blankenship brought to our most recent Supreme Court election.

As a constitutional officer elected by the people, I have a right and duty to speak out about the

administration of our justice system, including the conduct of judicial elections. I can have opinions, and still do my job fairly. I do decry murder and domestic violence and I speak out on it, and I also sit as a judge and hear cases involving people who are charged with those offenses.

I am one judge voting on this case who can say that I owe nothing to Mr. Blankenship one way or another — he did nothing to hurt or hinder my election. He did not fund my campaign, nor am I a social friend of his. It has been amusing for me to see Mr. Blankenship trying with all his might to create the circumstances where I would be forced to step aside and let him have *in toto* the kind of Court he wants — for example, he has said he will be "targeting" me in the next election if I run. Fortunately, the public can see through this kind of transparent foolishness, just as a West Virginia jury saw through his lies in court.

What is sad is that a majority of this Court is telling a West Virginia jury that their work to bring about justice was a complete waste.

Accordingly, I dissent.

No.33350 – *Hugh M Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

FILED
November 21, 2007
released at 3:00p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

The majority opinion in this case, written by Chief Justice Davis and agreed to by Justice Maynard and Justice Benjamin, is a result-driven effort to excuse without penalty an egregious exercise of raw economic power which a West Virginia jury has found seriously injurious to the plaintiffs in the case, deserving of substantial redress under the law.

The majority opinion, rejecting the judgment rendered below, rests on two conclusions, neither of which are valid in the circumstances:

> First, the majority opinion concludes that the West Virginia civil action in this case is barred by the doctrine of *res judicata* under Virginia law because an action in contract brought and adjudicated in Virginia

> in 1998 precluded a subsequent tort action in West Virginia involving some aspects of that contract and other activities of the defendants.
>
> Second, the opinion concludes that a "forum-selection clause" in a coal supply agreement to which some of the plaintiffs and all defendants *were not parties* required that the West Virginia tort action before us must be brought in Virginia.

The first reason, *res judicata*, is the easiest to address because the majority is just flat-out wrong. The common law of Virginia (and, historically, also of West Virginia) absolutely forbade filing contract and tort causes of action in the same lawsuit. *Goodstein v. Weinberg*, 245 S.E.2d 140, 143 (Va. 1978). That "judge-made" law was altered by the action of the Virginia Legislature in 1977, adopting § 8.01-272 of the Code of Virginia, to *permit but not require* contract and tort causes of action to be pursued in the same lawsuit. Thus, the option belonged to the plaintiffs, not the defendants, to decide whether to pursue one or two lawsuits to vindicate their allegedly infringed rights. The majority opinion engages in a convoluted discussion of claims, causes of action and remedies to hide the fact that it molds the law to attain the desired result, without recourse to the historical differences between contract and tort actions, without reference to the option of the *plaintiffs* to bring one or two actions under the law of Virginia at that time, and without an orderly discussion of those differences under both Virginia and West Virginia law. The long and the short of it is that the adjudication of the contract action in Virginia, resulting ultimately in a recovery of about

$6 million, did not affect the rights of the plaintiffs in the action *sub judice* to recover damages in tort in a separate action, under *either* Virginia or West Virginia law.[1]

The second reason asserted by the majority for vacating the verdict of the West Virginia jury which heard this case and vacating the resulting judgment entered on that verdict is the supposed application to the entire West Virginia action of a "forum-selection clause" in the 1997 coal supply agreement between the Harman companies and Wellmore Coal Corporation (not a party to the present litigation). This asserted reason presents a somewhat more difficult question.

In reviewing this second asserted reason, I start with the "consolation prize" language found in the majority opinion:

> [W]e wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified. As we

---

[1] It is to be noted that the "one recovery rule" was observed in West Virginia, in that the defendants here were accorded full credit against the West Virginia judgment for the contract claim recovery in Virginia. Moreover, the assertion in the majority opinion that a "good faith and fair dealing claim, originally raised in the Virginia action but voluntarily abandoned, was a tort claim does not survive scrutiny. Such a claim is for the breach of a covenant said to be implied in all contracts and sounds much more truly in contract than in tort.

> will demonstrate below, the law simply did not permit this case to be filed in West Virginia.

Slip op. at p. 13. Simply put, the last two sentences of this "consolation prize" language constitute the desired result of the majority, not a result dictated by the law, as the majority would have one believe.

What follows the majority's confession of the essential justice of the plaintiffs' suit is a lengthy discussion about "forum-selection clauses" in contracts, resulting in seven new syllabus points, applied to the facts of this case so as to relieve the defendants of a verdict in excess of $50 million, plus interest and costs, which would have resulted in a judgment calculated to be in excess of $75 million.

Beyond that result, the unnecessarily broad and sweeping language of the opinion and the syllabus points could close the courthouse doors of this State to citizens with meritorious claims, unwittingly caught up in these "forum-selection clause" contracts, designed in most cases to give some litigants advantages over others and, under the majority's analysis, applicable in some cases to *litigants not even party to the contracts* containing the "forum-selection clauses." This is all accomplished by adopting by judicial fiat "new law" not previously found in West Virginia's jurisprudence and applying that "new law" at every turn in the manner most likely to yield the result of overturning the jury's verdict and the judgment of the lower court giving effect to that verdict.

First, I note that the majority's discussions leading to syllabus points five, six, seven, eight and nine, all dealing with how to review forum-selection clauses, appear to be, in the abstract, welcome

additions to the law of this State. I recognize that it is the peculiar function of this Court in the ongoing development of our common law to speak to issues of law that have not been previously decided by this Court or decided by acts of the Legislature.

I depart from the views of the majority (1) because some of the language of the new syllabus points is unduly and dangerously broad, (2) because of the manner in which the majority then applies that "new law" to the facts of this case, and (3) because the sweeping language of the syllabus points fails to take into account that their application in certain circumstance may require findings of fact to which this Court ought to give deference, either because the court below is not "clearly wrong" in its consideration of the relevant facts, or because the court below is entitled to deference in its application of the law to the facts, absent an abuse of discretion. I will apply these concerns concretely to the case before us.

In syllabus point two, the majority asserts that "[o]ur review of the *applicability and enforceability* of a forum-selection clause is *de novo*." I respectfully suggest that our review is abuse of discretion, in large part because our review of those issues will most often be fact dependent and we should be attentive to the findings of the trial court with respect to those facts. *See Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (decision related to enforcement of a forum selection clause is reviewed for abuse of discretion, citing *Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002)); *TAAG Linhas Aereas de Angola v. TransAmerica Airlines, Inc.*, 915 F.2d 1351, 1353

(9th Cir. 1990) (enforcement of a forum selection clause reviewed for abuse of discretion) citing *Peleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 280 n. 4 (9th Cir. 1984) (basing abuse of discretion standard on *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7 (1972)).

In syllabus point six, which in the abstract I suggest is a well-stated point of law, the first inquiry is "whether the [forum-selection] clause was reasonably communicated to the party resisting enforcement." That is a fact-intensive inquiry further complicated by the majority's later assertion that such clauses may be made to apply to persons not party to the contract in which the clause is found. The majority blithely asserts that everyone in the instant case knew of the forum-selection clause; perhaps so, but is it the job of this Court to so declare?

The third query listed in syllabus point six asks "whether the claims and parties involved in the suit are subject to the forum-selection clause." The majority has no trouble finding that the parties to the contract readily understood and agreed that tortious interference, fraudulent misrepresentation and fraudulent concealment, the claims upon which the West Virginia jury returned its verdict, were to be brought in Virginia as matters "related to the contract," even though the evidence showed that substantial parts of the conduct involved had not one thing to do with the operation of the contract, and even though some of the parties to the tort action were not parties to the contract itself. For example, the purchase by the defendant Massey of a buffer between the Caperton properties and the Pittston property, to prevent the realization of a plan to mine

the Pittston field, was in no way related to the coal supply agreement. Rather such was an instance of where the "facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case." Slip op. at 13. **The point is that the majority went out of its way to make findings that fit its intended result rather than the justice of the cause.** In short, the inquiry, as posed in the syllabus point, is an either/or inquiry. Some claims here were related to the contract; some were not. The majority chose, in effect, to say if **any** of the claims were "related" to the contract, all were. The better rule, to withstand the test of time and circumstances in the real world, is the converse: If any of the claims are not related to the contract then plaintiffs may bring suit where they so choose. The majority opted to design the law in a manner that would free Massey from its responsibility in this State.

The lengthy majority opinion cites numerous cases for its various propositions. Practically all of these cases contain an exception by which the harsh rules relied upon by the majority would not be applicable in certain circumstances, or state rules that might not apply unless certain factual scenarios appear in the record. Without fail, the majority has chosen to construe the facts and circumstances of this case so as to prevent a favorable outcome for the plaintiffs. A most clear example of this is the majority's application of syllabus points ten and eleven.

In syllabus points ten and eleven, the majority adopted sweeping language to compel plaintiffs and defendants alike who are not party to contracts containing forum-selection clauses to be bound by

such clauses more often than not. This feat of legerdemain was accomplished by the majority first adopting a "closely related to the contract" test, and then adopting an analysis of the connection between plaintiffs' tort claims and the "forum-selection clause" contract that, in effect, puts the burden on the non-party to avoid the application of the "forum-selection clause." In particular, under the facts of this case, the majority constructed a close relationship almost out of whole cloth to bring about the result it desired. In the long run, the more devastating effect of this particular part of the opinion is that it invites future litigants to attack West Virginia litigants' ability to sue in the courts of this State based upon "forum-selection clauses" to which such West Virginia litigants were not parties and had received only cursory notice, perhaps by small print in limited warranty notices or financing agreements. The point is that the majority erred in favor of the powerful and against the unsuspecting. The point is our citizens have been put in jeopardy of losing remedies our law provides, in favor of more restrictive remedies provided elsewhere because such "forum-selection clauses" will only be invoked by those seeking to avoid responsibility – as in this case.

Congratulations to the majority. It has decided this case for the sake of Massey by protecting A.T. Massey Coal Company, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company and Massey Coal Sales Company, Inc. from the justified action of a West Virginia jury, rendering its verdict for, in the words of the majority opinion, "Massey's conduct [that] warranted the type of judgment rendered in this case." Slip op. at p. 13. The majority has done so by twisting logic, misapplying

the law and introducing sweeping "new law" into our jurisprudence that may well come back to haunt us, or more likely, haunt the people we are duty-bound to protect under our law. The majority of three has saved Massey $50 million, plus interest[2] and costs, which some reports calculate to total as much as $75 million today. For the sake of all West Virginians, young and old alike, I sincerely wish the result reached had been otherwise. Accordingly, I tender this heartfelt dissent.

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[2] I would have granted Massey's prayer for relief from interest accruing during the time the full record could not be reproduced due to problems with court reporting.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
APPEAL NO. 33350

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Appellees.

FILED
JAN 17 2008
RORY L. PERRY II, CLERK
SUPREME COURT
OF APPEALS
OF WEST VIRGINIA

MOTION OF HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC. FOR DISQUALIFICATION OF JUSTICE MAYNARD AND RENEWAL OF MOTION FOR DISQUALIFICATION OF JUSTICE BENJAMIN

Respectfully Submitted by

David B. Fawcett, Esq.
(Admitted Pro Hac Vice)
Buchanan Ingersoll & Rooney
20th Floor, One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

Robert V. Berthold, Jr., Esq.
(W.Va. Bar 326)
Christina L. Smith (W.Va. Bar 7509)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335
(304) 345-5700

Counsel for Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.

Appellees Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (hereinafter, collectively "Harman"), by their undersigned counsel, request that Justices Maynard and Benjamin recuse themselves from any further participation in this appeal, and to withdraw their votes in this matter Should Chief Justice Maynard and Justice Benjamin refuse to do so, Harman moves the remaining members of this Honorable Court to disqualify them from participating in further proceedings in this matter, and to withdraw their earlier votes in this matter, including their votes in favor of the Court's majority opinion

In support of this Motion, Harman incorporates herein by reference and joins in Hugh M Caperton's Motion and Amended Motion for Disqualification directed to Chief Justice Elliott E. Maynard. Counsel for Harman would note the request of Hugh Caperton and his counsel that they join in this Motion. Additionally, Harman states in support of its Motion the following:

1. Subsequent to the filing of Hugh M. Caperton's Amended Motion for Disqualification directed to Chiefiustice Elliott E. Maynard, Chief Justice Maynard issued a statement (attached hereto as Exhibit "A") in which he disclosed his friendship with Mr Don Blankenship, and that he had meetings with Massey's Chief Executive Officer on the French Riviera during the pendency of this appeal.

2. If the law of the State of West Virginia permits a sitting Supreme Court Justice to meet, dine with and take extravagant vacations with the CEO of a party during the pendency of a substantial appeal to the Court by the CEO's corporation, there

will be an overwhelming perception of impropriety looming over the Supreme Court of West Virginia, and could encourage other parties to take similar actions

3. On October 10, 2007, this Court held the long-awaited oral argument of Massey's appeal in this very substantial dispute.

4. In addition to the contacts, meetings and travel alleged in Caperton's Motions for Disqualification of Chief Justice Maynard, it was reported by movant, Hugh Caperton, that Justice Maynard had a private dinner meeting with Massey's CEO Don Blankenship on or about November 8, 2007, or approximately four weeks after the oral argument in this case, but before the written decision of this Court.

5. In the short time that has elapsed since the filing of Hugh M. Caperton's Amended Motion for Disqualification, additional information has been provided to the Appellees and their counsel revealing other significant contacts, dealings and interrelationships between Don L. Blankenship and Chief Justice Maynard which were never disclosed by Chief Justice Maynard.

6. Canon 3E(1) of the Judicial Code of Conduct states "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ." (emphasis added). As Justice Maynard reiterated in his opinion in *West Virginia ex rel. Mantz v. Zakaib*, 216 W.Va. 609, 614, 609 S.E.2d 870, 875 (2004), quoting *In the Matter of Karr*, 182 W.Va. 221, 224, 387 S E.2d 126, 129 (1989), "when the language of the canon is clear and unambiguous, the plain meaning of the canon . . . is

to be accepted and followed without resorting to interpretation or construction."

7. In *Mantz v.. Zakaib*, Justice Maynard also cited to and quoted from an earlier decision of the Supreme Court, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va., at 108, 459 S.E.2d at 385:

> To protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality *might reasonably* be questioned . . . In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2203, 100 L.E.2d 855, 872-73 (1988), the United States Supreme Court described *the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality*. . . To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

(Emphasis added.)

8. Any reasonable and objective person, knowing what is now known about the contacts between Justice Maynard and Mr Blankenship revealed by the photographs appended to Caperton's Amended Motion for Disqualification Directed to Chief Justice Elliott E. Maynard, would certainly harbor doubts about his ability to be impartial in this case, regardless of who paid for the alleged trip, while this case was pending before this Court.

Justice Benjamin's Vote Should Also be Withdrawn and He Too Should Be Disqualified from Further Participation in the Appeal

9. Harman moved for the disqualification of Justice Benjamin from any role in the appeal of this case on or about October 19, 2005. *See* Motion of Respondent Corporations for Disqualification of Justice Benjamin. In support of its Motion, Harman appended 84 exhibits, each relating to the unprecedented and massive amount of money spent by Mr. Blankenship in support of both the defeat of then sitting Justice Warren McGraw, and the election of the person who took Justice McGraw's place on the Supreme Court of Appeals, Justice Benjamin.

10. Harman alleged in its Motion that Mr. Blankenship invested nearly $3 million in direct or indirect support ofJustice Benjamin — more than any person, other than a person seeking his own election, had ever spent to effect the outcome of a state judicial race, certainly in West Virginia and perhaps in the United States. Upon information and belief, prior to the Harman verdict, Mr.. Blankenship had never involved himself so deeply in a judicial campaign.

11. On April 7, 2006, Justice Benjamin issued a Memorandum to Rory L. Perry, II, Clerk of the Supreme Court of Appeals, indicating that he was declining to recuse himself, stating, "[N]o objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case."

12. As stated above, this is simply not the test against which Harman's Motion should have been decided. Rather, the test is whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. Indeed, Justice Benjamin conceded as much when he committed shortly after his election to considering recusal in cases involving Mr. Blankenship and Massey. Justice Benjamin should also disclose the nature of his relationship with Mr. Blankenship, including private meetings, dinners, etc.

13. Application of the objective test mandated by this Court – rather than Justice Benjamin's subjective belief about his impartiality – requires that Justice Benjamin withdraw his vote in this matter and recuse himself from any further participation in the case, also.

WHEREFORE, Harman respectfully requests that Justices Maynard and Benjamin withdraw their respective votes in this matter and disqualify themselves from any further participation in the consideration of the appeal of this matter and, if they fail to do so, that the Court take such appropriate action as it deems necessary.

Respectfully Submitted by

/s/

David B. Fawcett, Esq.
Buchanan Ingersoll & Rooney
One Oxford Centr, 20th Floor
301 Grant Street
Pittsburgh, PA 15219

/s/

Robert V. Berthold, Jr., Esq.
(W.Va. Bar 326
Christina L. Smith
(W.Va. Bar 7509)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335

Counsel for Appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc.

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

NEWS

Information Services
Director
Jennifer Bundy
Direct Phone – (304) 340-2305
Kandi Greter – (304) 340-2306

Administrative Office
1900 Kanawha Blvd., East
Bldg. 1, Room E-316
Charleston, West Virginia 25305
Web Site:
http://www.state.wv.us/wvsca

Email:
Jennifer.Bundy@courtswv.gov
Email:
Kandi.greter@courtswv.gov

FOR IMMEDIATE RELEASE:
January 15, 2008

CONTACT: Jennifer Bundy
(304) 340 - 2305

Chief Justice Mayard issues statement

CHARLESTON, W.Va. — West Virginia Chief Justice Elliott "Spike" Maynard said today, "I will file a written response promptly to the motion filed yesterday, but first let me say I've been a prosecutor, Judge or Justice for more than 30 years and nothing is more important to me than the integrity of the Court.

"The suggestion I have done something improper is nonsense.

"Like most judges I don't reward my friends, or punish my enemies from the bench.

"I have never denied my friendship with Mr. Blankenship. Our friendship has never influenced any decision I've made for the Court..

"I'm going to address the specific allegations separately, but I want to be crystal clear that in the noted trip I paid my own way, paid for my travel expenses, paid my own hotel expenses out of my own pocket. I have receipts and records to prove it."

# # #

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EXHIBIT
A

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice /s/

Date: January 18, 2008

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.; Docket No. 33350*

Pending: Motion of Disqualification of Justice Brent D. Benjamin filed by Appellees Harman Development Corporation, *et al.* on January 17, 2008

Pending is a renewal of a motion seeking my disqualification in this case filed by appellees, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. [collectively referred to herein as "movants"]. This case is currently pending before this Court on motions by appellees for a rehearing related to this Court's November 21, 2007 decision which reversed the lower court decision (with Justices Starcher and Albright dissenting and myself concurring).

A review of the instant motion reveals the motion to essentially be identical to an earlier motion filed by movants in which I issued a memorandum on April 7, 2006 denying the prior motion, finding:

> Despite the amount of materials filed, little if any relates to this Justice and no *objective* information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and

> impartial in his consideration of matters related to this case. What is amply present in the materials is surmise, conjecture and political rhetoric. [Footnote omitted.]

[Emphasis added.] It is observed that movants present no new information, objective or otherwise, to support their contentions. It is furthermore noted that this motion was not filed until after the decision contrary to the positions of movants in this matter was rendered and after the undersigned filed his concurring opinion to that majority opinion. Finally, it is noted that the motion contains no specific legal precedent for the position advanced by movants.

The motion seeking disqualification comes over three years after the 2004 election and focuses entirely on that election. It contains nothing about this Justice's record on the Court. There are no allegations that this Justice has or has had any relationship with Mr. Blankenship or any party in this litigation, or that he ever represented Mr. Blankenship or any Massey company in his twenty-plus years of private practice. Nor is this Justice aware of any basis by which this Justice should disqualify himself.

It is noted that in over three years of service on this Court involving a number of decisions involving the interests of Massey Coal and/or its subsidiaries, no other litigants have sought this Justice's disqualification, including the Office of the Attorney General of West Virginia, Darrell V. McGraw, Jr. Furthermore, it is also observed that, according to a November 3, 2005 article by Ken Ward, Jr., in *The Charleston Gazette*, state environmental regulators saw "no grounds" to ask this Justice to be disqualified. According to the article, Perry

McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, related that DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking this Justice's disqualification in a matter involving Massey. According to McDaniel, "There are clearly no grounds here for us to ask a Supreme Court justice elected by the people to step down in this matter."

Disqualification of a publically-elected judge is appropriate only when the motion is supported by a factual basis, and when the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality. As demonstrated in the preceding paragraph, the instant motion fails this test. Indeed, the need for a proper factual basis to support a motion for disqualification is necessary to ensure that popularly-elected judges are not subject to media-driven attacks from which they cannot defend themselves, from campaigns to generate a veto power over judges by the creation and maintenance of public controversy in media outlets, and from attempts to engage in "judge-shopping"—a practice universally condemned. A review of my earlier memorandum demonstrates that movants then, as now, fail to advance any objective evidence which may serve as a proper basis for this Justice's disqualification in this matter.

Simple conclusory accusations and assumptions are plainly insufficient to support a motion for disqualification. To interpret the term "impartiality might reasonably be questioned" in such a subjective and partisan manner as the movants seem to suggest, particularly after this Justice voted in the Majority against their legal positions in this case,

would create a system where there would be almost no limit to recusal motions and popularly-elected courts of this State would be open to "judge-shopping" under the guise of litigation strategy.

As referenced in my earlier decision, the District of Columbia Circuit Court of Appeals wisely observed, in dicta, that, "[i]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision" is appropriate to this motion. *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) at FN 360. In that case, involving matters related to the Nixon Administration, attorneys sought the disqualification of Judge John Sirica. Lacking a proper factual basis for such an attempt, they failed. Therefore, a litigant's subjective belief, without more, that a Justice may be more or less favorable to his position is an insufficient basis for disqualification.

The instant motion is denied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of January 2008, the following order was made and entered:

A. T. Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants

vs.) No. 33350

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

Memorandum

To: Rory L. Perry, Clerk of Court

From: Chief Justice Elliott E. Maynard

Date: January 18, 2008

Re: *Caperton, et al. V. A.T. Massey. et al.*, No. 33350

It is not enough to do Justice--Justice also must satisfy the appearance of Justice. I have decided to voluntarily recuse myself from this case. I will recuse myself despite the fact I have no doubt in my own mind and firmly believe I have been and would be fair and impartial in this case. I know that of a certainty.

The issue, because of the controversy surrounding this case, is no longer an issue of whether I can be fair and impartial. Rather it has now become an issue of public perception and public confidence in the courts. Above all else, I am very concerned about how the public .views this court.

Without question, the Judicial Branch of state government should always be held in the highest public confidence and trust. The mere appearance of impropriety, regardless of whether it is supported by fact, can compromise the public confidence in the courts. For that reason -- and that reason alone -- I will recuse myself from this case.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of January, 2008, the following order was made and entered:

A. T. Massey Coal Company, Inc.
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.
Appellants

vs.) No. 33350

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

This day came the Honorable Elliott E. Maynard, Chief Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of this Court of his voluntary disqualification from participating in the above-captioned proceeding, pursuant to Canon 3(E)(1)(d) of the Code of Judicial Conduct and Rule 29 of the Rules of Appellate Procedure.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January 2008, the following order was made and entered:

Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc., Plaintiffs Below, Appellees

vs.) No. 33350

A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., Defendants Below, Appellants

The Court, having maturely considered the petitions for rehearing filed by the appellees, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc, and Hugh M. Caperton, by their attorneys, on the 20th day of December, 2007, doth hereby grant said petitions for rehearing.

It is hereby ordered that the above-captioned proceeding be reargued and is hereby placed on the Court's Argument Docket scheduled for Wednesday the 12th day of March, 2008. It is further ordered that the appellants and appellees file an original and nine copies of supplemental briefs within twenty days of receipt of this order; the appellants and appellees to file a like number of supplemental responses within ten days of their receipt of the supplemental briefs. It is further ordered that such supplemental briefs and responses are limited to 50

pages, pursuant to Rule 10(d) of the Rules of Appellate Procedure, and no motions to exceed such limit will be considered by the Court.

Justice Maynard deeming himself disqualified did not participate in this decision. Judge Cookman sitting by special assignment.

Justice Davis would vote to grant the petition for rehearing based upon Chief Justice Maynard's recusal of himself from this case; the appointment of the Honorable Donald H. Cookman to sit by temporary assignment in this case; and the decision of the United States Supreme Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-28, 106 S. Ct. 1580, 1588, 89 L. Ed. 2d 823 (1986) ("[W]e are aware of no case . . . permitting a court's decision to stand when a disqualified judge casts the deciding vote.").

Justice Starcher states: I voted to rehear this case because I believe the earlier majority opinion was in error, for the reasons stated in my dissent and Justice Albright' s dissent. The appellees deserve the right to bring those errors to the attention of the Court.

However, I would have strongly preferred not to vote on the rehearing until we had discussed the matter further. If we had taken time, and not decided the rehearing issue on this day, there would be absolutely no injury to any party. This case has been pending for several years, and a few more days or weeks will do no harm.

If we had taken time, matters relating to Court's prior decision in this case could be properly considered, including the effect of Justice Maynard's recent recusal. If it was right for Justice Maynard to

have recused himself and not voted in this case - after the pictures filed in a recent motion were publicly revealed and he acknowledged contacts with a litigant's CEO while this case was pending - should his prior vote, while the pictures and contacts were a secret, have any effect at all? This issue remains unresolved.

Moreover, taking time might have helped resolve other matters. My participation in deciding this case has been challenged on the grounds that I have spoken clearly and distinctly about my dislike for the way individual money was spent in the last Supreme Court election by that same CEO. I have an absolute right and duty to comment publicly on that issue, although my language should have been more temperate, I admit. But I can separate that opinion from my understanding of the law.

Furthermore, Justice Benjamin, who benefitted from expenditures of huge amounts of money provided by that same CEO has also been criticized for sitting on this case; and he, I am sure, also sincerely believes he can separate that fact from his understanding of the applicable law. (I stepped aside in 1996 in an asbestos case because of $36,500 in campaign contributions from lawyers, even though their contributions had no effect on my rulings.)

Nevertheless, I would have preferred that we both take time to consider whether it would be better to step aside. But taking time for that possibility was rejected by the majority.

In the absence of any possibility to postpone a vote and have more reflection on these matters, I have voted to rehear the case.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of February, 2008, the following order was made and entered:

A. T. Massey Coal Company, Inc.
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.
Appellants

vs.) No. 33350

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

This day came the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of this Court of his voluntary disqualification from participating in the above-captioned proceeding, pursuant to Canon 3(E)(1) of the Code of Judicial Conduct.

A True Copy

Attest:/s/_____
Clerk, Supreme Court of Appeals

A. T Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants,

v. No. 33350

Hugh M Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees.

FILED
FEB 15 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Very early in the appeal of this case the appellants, A. T. Massey Coal Company, Inc., *et al.*, filed a Motion for the Disqualification of Justice Starcher. I responded in a manner much the same as I have responded to the many other requests for me to step aside in the numerous cases that Massey and its subsidiaries have had before this Court over the past several years. Consistently, I have taken the position that while I have personal thoughts about Massey's corporate behavior — I do read the papers — and the views and practices of Massey CEO Don Blankenship, I could still fairly judge any matter involving those parties presented to me in my judicial capacity. It is no different than judging drunk drivers, spousal abuse, criminal behavior of an individual, certain reprehensible behavior of tobacco companies or the conduct of predatory lenders —

behavior which I personally abhor, yet professionally pass judgment on regularly.

I believe that it is time for me to reconsider the request of the Massey appellants for me to recuse myself from participating in this Court's decision of the appeal in this case.

This case has been in litigation for years, and over this time it has taken on enormous public proportions. It has become a "problem case." It has become a case that is much talked about; a case in which three of the Court's five justices have been requested to step aside; a case in which, after multiple requests followed by evidence that was damning and undeniable, one of the three justices did step aside; and a case in which, over time, I have become part of the problem. The public rightfully might be of the opinion that all three of the justices, including me, could not be fair to one side or the other in this case, despite our best efforts or whatever we might say. There is, therefore, a reasonable appearance of impropriety.

Still, it is really the height of irony for the appellants to suggest that my public statements about certain views and practices by the appellant's CEO, Don Blankenship, should disqualify me from participating in the decision of the instant appeal.

In fact, it has been Mr. Blankenship who has gone out of his way to bring public attention to my views about his "one rich man buys an election" tactics. Mr. Blankenship even sported a "Get Starcher" ball cap announcing me as his "next target" as he publicly celebrated spending millions to influence elections in our State. As a judge I am limited in my public comments, but I do have a constitutional right — and in fact a duty — to speak

out on matters affecting the administration of justice. And let me be clear about this: I believe Mr. Blankenship's conduct does have an effect on the administration of justice, in that it has become a pernicious and evil influence on that administration.

Let me be more specific. Mr. Blankenship's companies have sued this Court in a federal court, alleging that *my* statements and *my* refusal to disqualify myself from hearing cases involving his companies violate their Constitutional rights. But nowhere in that lawsuit do they acknowledge that Mr. Blankenship, his money, and his friendship have far more egregiously tainted the perceived impartiality of this Court than any statement by me.

For example, when certain photographs were recently revealed as an attachment to a disqualification motion in this case, the public learned that Mr. Blankenship has enjoyed a longstanding and close relationship with another justice on this Court. The two vacationed in Europe together at the very time that this case was pending before the Court, and who knows what else? The details of that relationship and that vacation have still not been fully disclosed or independently investigated — and they should be. Having never before acknowledged this close relationship, even when cases involving Mr. Blankenship's companies were before this Court, that justice did recently step aside in this case, but only after a second request and the release of the photos. That same justice has been voting on cases involving Mr. Blankenship's companies for years. What about all those previous votes? What are the consequences of these facts? Certainly Mr. Blankenship's asserted "partiality"

arguments that focus solely on my recusal are of less consequence by comparison.

Moreover, that justice recently voted to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship's companies.

Additionally, shortly before this case was appealed to this Court, another justice ran an election campaign in 2004 that was supported by somewhere around $4,000,000 from Mr. Blankenship and/or Massey associates. So far that justice has refused to recognize that this fact has a bearing even on his *perceived impartiality*. That justice not only remains on this case, as well as other Massey cases before the Court, but that justice continues at this time to appoint replacement judges in all Massey cases.

Shortly after the 1996 primary election when I was nominated by my party for a seat on this Court, I was in the process of trying (as a Monongalia County circuit judge) large numbers of asbestos cases. I had set a trial for August 19, 1996, for about 7,000 plaintiffs — simply to do my best at cleaning up my local docket, in anticipation of being on the Supreme Court in January, 1997. Several of the asbestos-producing defendants filed a "Motion to Disqualify Judge Larry V. Starcher." The Motion was signed by attorney Charles R. McElwee, then a senior partner in the Charleston law firm of Robinson & McElwee, the very law firm from which the justice whose election campaign was so generously supported by Mr. Blankenship came.

Now, the basis for Mr. McElwee saying I should step aside in that trial court asbestos litigation was

that several lawyers had contributed as much as $1,000 each to my primary election campaign — and the total complained of was $36,500.

I think that it is fair to say at this point that Mr. McElwee is no longer a lawyer at the Robinson & McElwee law firm. He currently is a $90,000/annually law clerk for the justice to whom Mr. Blankenship was so benevolent. And, although Mr. McElwee "came to the Court" at the same time the justice came, he has neither an office nor a phone at the Court.

Let me quote some of the language from Mr. McElwee's (now that justice's current senior law clerk) "Memorandum in Support of the Motion to Disqualify Judge Larry V. Starcher" dated July 24, 1996:

> The standard for determining [the judge's] disqualification is whether a reasonable and objective person knowing of such campaign contributions . . . would harbor doubts about [the judge's] impartiality. . . . Under this standard, the proper finding is manifest. A reasonable and objective person knowing the timing and the amounts of such large campaign contributions . . . would indeed harbor doubts about [the judge's] impartiality. . . . Judges are reluctant to recuse themselves. . . . The goal of courts is to avoid even the appearance of impropriety for, as the Court explained in *Tennant [v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374, 385 (W. Va. 1995)], "avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself. . . ."

> and "A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willing." Commentary, Canon 2, Code of Judicial Conduct.

I voluntarily stepped aside in that 1996 case.

My point is this: In 1996, my campaign finance committee accepted individual contributions from lawyers in amounts up to $1,000 apiece for the benefit of my campaign, and — except in this one 1996 case — in a dozen years since no one has asked me to step aside as a result of those contributions. That recusal request was based on my campaign receiving a total of $36,500 from lawyers in a mass tort case involving thousands of plaintiffs. And I repeat — I did step aside in that case. I believe that $36,500 pales in comparison to $4,000,000. I also believe that there is a significant difference between campaign contributions from lawyers who have a vested interest in a fair, impartial and efficient judiciary, and a very active litigant who had lawsuits pending in the Court at the very moment he made huge amounts of money available to support a justice's election, and whose only vested interest in the Court is "winning his cases." I believe John Grisham got it right when he said that he simply had to read *The Charleston Gazette* to get an idea for his next novel.

Just think about it — $4,000,000! I know hardly a soul who could believe that a justice who benefitted to this extent from a litigant could rule fairly on

cases involving that litigant or his companies — or appoint judges to sit on those cases. This is the very definition of "appearance of impropriety." While the huge amount of money alone speaks volumes, how it was used speaks even louder — distortions and smears were the focus of the campaigns supported by this money.

I would be remiss if I did not point out that this type of "big money" — special interest expenditures — has been directed at furthering an agenda that only partly involves influencing the composition of the Court. It also has been and continues to be directed at wounding our State's judiciary with false claims portraying West Virginia as a "judicial hellhole," false claims that facts do not support and false claims that have been refuted by academic researchers at West Virginia University. These claims are simply false, but truth and accuracy mean nothing to people who want to skew the justice system in their favor.

The simple fact of the matter is that the pernicious effects of Mr. Blankenship's bestowal of his personal wealth, political tactics, and "friendship" have created a cancer in the affairs of this Court.

I was born a poor boy in an old farm house in West Virginia. I was the first in my family to graduate from high school and then college; I was fortunate to receive a good education. I came to the practice of the law and the judiciary with an idealism rooted in the belief that big money should never be permitted to buy, or be seen to buy, justice. That idealism is the sole reason that I have spoken out against Mr. Blankenship's views and practices, as they relate to our State's judiciary.

Those distorted views and practices allow Mr. Blankenship to secretly cavort on the Riviera with a justice of this Court, while he had a $60,000,000 case pending before the Court — and see nothing improper. Those views and practices allow him to claim no appearance of impropriety in presenting his case to a justice whose election he supported with something around $4,000,000. And those views and practices allow him to claim that the only "partiality" problems he has with this Court are *my* statements criticizing *those* very views and practices.

As I said in my dissent to the majority opinion in this case when the "first decision" was released in November 2007: "I am one judge voting on this case who can say that I owe nothing to Mr. Blankenship one way or the other — he did nothing to hinder or hurt my election. He did not fund my campaign, nor am I a social friend of his. It has been amusing for me to see Mr. Blankenship trying with all his might to create circumstances where I can be forced to step aside and let him have *in toto* the kind of Court he wants .... Fortunately, the public can see through this kind of transparent foolishness, just as a West Virginia jury saw through his lies in court."

I repeat — the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow, in ways that I may not fully disclose at this time. At this point, I believe that my stepping aside in the instant case *might* be a step in treating that cancer — but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of

this wonderful State will feel about our justice system.

And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case. Perhaps, a serious read of the United States Supreme Court case, *Aetna Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed. 2d 823 (1986), is in order before such a decision is made.

For the foregoing reasons, in the interest of justice, on this 15th day of February, 2008, I recuse myself in the above-styled case.

/s/
Justice Larry V. Starcher

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

FILED
MAR 28 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, and MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

Appeal No. 33350

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, SOVEREIGN COAL SALES, INC.,

Appellees.

SECOND RENEWED JOINT MOTION FOR DISQUALIFICATION OF JUSTICE BENJAMIN

Counsel for Appellee Hugh M. Caperton:

Bruce E. Stanley, Esq. (W.Va. Bar 5434)
Tarek F. Abdalla, Esq. (W.Va. Bar 5661)

Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-7254

Counsel for Corporate Appellees:

Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)
Christina L. Smith (W.Va. Bar 7509)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335
(304) 345-5700

David B. Fawcett, Esq. (*Admitted Pro Hac Vice)*
Buchanan Ingersoll & Rooney
20th Floor, One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

SECOND RENEWED JOINT MOTION FOR DISQUALIFICATION OF JUSTICE BENJAMIN

Now come all Appellees, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., and respectfully move for the disqualification of Justice Benjamin.

1. Canon 3E(1) of the West Virginia Code of Judicial Conduct directs that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]" "The question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly." *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 174, 444 S.E.2d 47, 52 (W.Va. 1994).

2. Whether the impartiality of a judge might reasonably be questioned is determined by asking whether a reasonable and prudent person, given all the facts and circumstances, might doubt the judge's ability to be fair. *See United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1999) (interpreting federal recusal statute identical to Canon 3E(1)).

3. All Appellees except Caperton previously presented a Motion to Disqualify Justice Benjamin based upon the fact that, after the verdict was rendered in this matter, the CEO of Massey Energy Company, its subsidiaries (collectively "Massey"), and others expended over $3.5 million to help Justice Benjamin's election to this Court — a fact which caused a public outcry, produced remedial legislation, and which, Appellees alleged, would cause a reasonable person to question Justice Benjamin's ability to be fair and impartial in hearing Massey's appeal to this Court to reverse or greatly reduce the very substantial judgment entered against Massey in the trial court below.

4. Justice Benjamin denied Appellees' Motion to Disqualify without reference to the applicable judicial canon or the standard as enunciated in case law which requires recusal when a reasonable person would harbor doubts about his ability to be fair and impartial.

5. In denying the Motion, Justice Benjamin characterized the materials submitted in support of the disqualification motion as "surmise, conjecture and political rhetoric." (4/7/06 Memorandum from Benjamin, J. to R. Perry, p. 2.)

6. Following revelations that another Justice of this Court had meetings with Massey's CEO while on vacation in Monte Carlo during the pendency of

this appeal, and following that judge's recusal, Appellees (except for Caperton) renewed their Motion for Disqualification of Justice Benjamin based upon the further public outcry affecting the perceived integrity of this Court. The renewed motion cited newspaper articles, newspaper editorials, media reports and even a recently published bestseller – all constituting evidence that ordinary persons might harbor doubts concerning Justice Benjamin's ability to fairly consider this appeal.

7. Although Justice Benjamin again failed to apply the applicable standard in denying this renewed motion, he characterized the motion as containing "simple conclusory accusations" and lacking in factual support: "Disqualification of a publically-elected [sic] judge is appropriate only when. . . the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality. As demonstrated in the preceding paragraph, the instant motion fails this test." (1/18/08 Memorandum from Benjamin, J. to R. Perry, p. 3.)

8. Appellees contend that the objective facts concerning the unprecedented and massive support received by Justice Benjamin during his election campaign from Massey's CEO and others overwhelmingly met the applicable standard, that is, that a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial.

9. While neither Canon 3E(1) nor case law interpreting that Canon require the submission of specific evidence of public opinion, Appellees commissioned a telephone survey of West Virginia

residents to be conducted by Talmey-Drake Research & Strategy, Inc. ("Talmey-Drake"), a well-regarded public opinion and market research firm located in Boulder, Colorado. Talmey-Drake conducted random telephone interviews of West Virginia residents (from all of West Virginia's counties) between March 24 and 28, 2008 to meet Justice Benjamin's charge that Appellees are proceeding on nothing more than conjecture and speculation.

10. The results of the survey unequivocally confirm that reasonable and prudent West Virginians, in fact, have doubts that Justice Benjamin can be fair and impartial given the $3.5 million spent by the CEO of Massey Energy and others in support of his election to the Supreme Court of Appeals. More particularly,

- Over 67% of West Virginians doubt that Justice Benjamin will be fair and impartial in considering this appeal.
- Only 15% of the adult residents of West Virginia believe that Justice Benjamin can be fair and impartial in considering this appeal.

See Affidavit of Robert Drake, Senior Vice President of Talmey-Drake, attached hereto. The results of this poll constitute clear, objective and indeed overwhelming evidence that Justice Benjamin's disqualification is required in this matter.

For these reasons, Appellees again respectfully request that Justice Benjamin recuse himself from this appeal; disqualify himself from any further participation in the consideration of the appeal of this matter following the clear standard as set forth in Canon 3E(1) of the West Virginia Code of Judicial

Conduct; and, if he fails to do so, that the Court disqualify him from any further participation in the appeal of this matter.

Respectfully submitted,

/s/

Bruce E. Stanley, Esq. (W.Va. Bar 5434)
Tarek F. Abdalla, Esq. (W.Va. Bar 5661)
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Counsel for Plaintiff-Respondent
Hugh M. Caperton

/s/

Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)
Christina L. Smith (W.Va. Bar 7509)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335

Counsel for Corporate Plaintiffs-Respondents

/s/

David B. Fawcett, Esq.
Buchanan Ingersoll & Rooney
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219

Co-Counsel for Corporate Plaintiffs-Respondents

AFFIDAVIT OF ROBERT DRAKE

1. My name is Robert Drake and I am the Senior Vice President of Talmey-Drake Research & Strategy, Inc. ("Talmey-Drake"), a public opinion and market research firm located in Boulder, Colorado.

2. Talmey-Drake was retained by Appellees to conduct a survey of West Virginia voters to determine their opinions regarding, among other matters, Justice Benjamin's ability to be fair and impartial in both the Harman Mining versus A. T. Massey Coal Company case ("the Harman case") and the case in which Wheeling Pittsburgh Steel Corporation sued .Massey Energy ("the Wheeling Pitt case") (The survey will be referred to herein as "the West Virginia Judicial Issues Survey.")

3. Founded in 1985, Talmey-Drake has performed thousands of surveys 'for clients in a wide variety of industries, including telecommunications, insurance, health care, finance and other service industries. Located in Boulder, Colorado, Talmey-Drake conducted issues and election polling for NewsCenter 4, the CBS affiliate in Denver, and both the *Denver Post* and the *Denver Rocky Mountain News*, for over 20 years.

4. I was the lead researcher, in consultation with Talmey Drake's President, Paul Talmey, for the West Virginia Judicial Issues Survey.

5. I joined Talmey-Drake in May, 1987. I received my undergraduate degree from Duke University (B.A. Political Science, 1972), and my J.D. degree from the University of Denver (1976). Since joining Talmey-Drake in 1987, I have personally initiated and overseen more than 1000 survey and focus group research projects, concentrating my

efforts on public opinion, education, healthcare and political research, as well as on telecommunications research, particularly for the cable TV industry.

6. Paul Talmey holds a B.A. in economics and mathematics and an M.B.A. from the University of Colorado. Mr Talmey has taught marketing research at the graduate level and economics, statistics, computer programming and operations research at the undergraduate level. He has also worked as a statistical consultant to Stanford Research Institute. He is a past Chairman of the Council of American Survey Research Organizations.

7. The West Virginia Judicial Issues Survey was conducted in accordance with well-accepted standards for the design, execution and reporting of such surveys. The survey instrument, including the percentage distribution of responses to all questions, is attached to this Affidavit as Exhibit A.

8. Between March 24 and March 27, 2008, Talmey-Drake conducted 753 interviews with randomly selected West Virginia voters. Quotas were selected in order to obtain approximately equal representation for men and women, as well as appropriate representation from each of West Virginia's counties.

9. The interviewing for the West Virginia Judicial Issues Survey was conducted by American Research Interviewing, a company spun off from Talmey-Drake in 2002. All interviewers receive training in standard interview techniques in order to assure that the interviewer does not bias the survey. In addition, the interviewers were specifically briefed on this particular survey before commencing any interviews, but were not told for whom the survey was being conducted.

10. All interviewees were asked whether they had heard discussions about whether Justice Benjamin should remove himself from deciding the appeal in both the Harman and Wheeling Pitt cases as a result of the three and a half million dollars spent by Don Blankenship, the head of Massey Energy, to help elect Justice Benjamin to the West Virginia Supreme Court. (*See* question 5 in Exhibit A) Thirty-seven percent answer yes and 60 percent say no. (A bar chart reflecting these results is attached as Exhibit B.)

11. Interviewees were also asked whether the three and a half million dollars spent by the head of Massey Energy to help elect Justice Benjamin creates doubt in their minds that Justice Benjamin will be fair and impartial in the two cases. Sixty-seven percent (when asked about the Harman case) and 68 percent (when asked about the Wheeling Pitt case) say they have doubts that Justice Benjamin will be fair and impartial. And in both the Harman and Wheeling Pitt cases only 15 percent say they feel that he can be fair and impartial. (*See* questions 6a, 6b, 7a and 7b in Exhibit A) (A bar chart illustrating these results is attached to this Affidavit as Exhibit C.)

12. Among those interviewees who say they had previously heard discussions of whether he should remove himself from deciding the appeals, 74 and 75 percent (in the Harman case and Wheeling Pitt case respectively) say they have doubts that Justice Benjamin will be fair and impartial.

13. A random sample of 753 has a margin of error of plus or minus 3.6% about any one reported percentage.

Dated: 3/28/08

/s/
Robert Drake

Talmey-Drake Research & Strategy
Project 806

W. VIRGINIA ISSUES SURVEY

Hello, my name is_____. First, I want to assure you that we're not selling anything, or asking for money. I'm with Talmey-Drake Research, a public opinion and market research company in Boulder, Colorado. We're conducting a very brief survey about a matter of importance to the people of West Virginia, and we would like to include your opinions.

SCREENER

A First, I would like to confirm that you are 18 years old or older and are registered to vote at this residence *[n=753]*

Yes	100% ⇨ *Go to C*
No	⇨ *Go to B*
Dk/NS	⇨ *Go to B*

B. *[Ask only if R says "No" or "DK/NS" in Screener A, else go to Screener C].* Is there someone in this household who is 18 years old and registered to vote, with whom I might speak?

Yes	100% ⇨ *Start over*
No	⇨ *Terminate*
DK/NS	⇨ *Terminate*

C Sex *[Do not ask] [jn=753]*

Male	48%
Female	52%

1 Next, I would like to read to you the name of four companies or individuals. After I read each one, please sell me whether you have very positive feelings, somewhat positive feelings, somewhat negative feelings, or very negative feelings about that individual or company. If you don't have any feelings, one way or the other, or have never heard of that person or company, just say so. The first is: *[Read list – randomize] [n-753]*

a. Massey Coal Company

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
5%	21%	28%	13%	13%	1%	18%	1%

Massey Coal Company *[w/Never Heard removed]*

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
6%	26%	34%	16%	15%	1%	--	2%

b. Don Blankenship

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
3%	10%	23%	12%	12%	1%	37%	2%

Don Blankenship *[w/Never Heard removed]*

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
6%	15%	37%	19%	19%	1%	--	3%

c. Wheeling Pittsburgh Steel Corporation

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
8%	19%	34%	3%	3%	1%	29%	3%

Wheeling Pittsburgh Steel Corporation *[w/Never Heard removed]*

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
12%	27%	48%	4%	4%	1%	--	4%

d. Senator Jay Rockefeller

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
28%	33%	19%	10%	7%	*	2%	1%

Senator Jay Rockefeller *[w/Never Heard removed]*

---Positive---			---Negative---			Never	DK/
Very	Some	Neut	Some	Very	Both	Heard	NS
29%	33%	19%	11%	7%	*	--	1%

*An asterisk, wherever it appears, means that the result for that response rounds to less than 1%.

2. Next, I will ask you about two court cases that are currently being appealed by mining companies in West Virginia. In the first case, Harman Mining versus A.T. Massey Coal Company, Harman Mining sued Massey Coal Company. and after a jury trial in 2002, Harman Mining won a judgment now worth $75 million dollars. Massey Coal has appealed to the five-member West Virginia Supreme Court, asking that the $75 million dollar judgment be greatly reduced or thrown out altogether. Before just now, had you read or heard anything about this case between Harman Mining Company and Massey Coal? If you don't know or are not sure, just say so and I will move on *[n=753]*

Yes, had heard of it before	37%
No, had not heard of it before	61%
DK/NS	2%

3. The second case involves a different, but related, Massey company, called Massey Energy. In this case, Wheeling Pittsburgh Steel Corporation, often referred to as Wheeling Pitt, sued Massey Energy and, after a jury trial in 2007, Wheeling Pitt won a judgment of $240 million dollars. Massey Energy is now trying to appeal the case to the five-member West Virginia Supreme Court, and is asking that the $240 million dollar judgment be greatly reduced or thrown out altogether. Before just now, had you read or heard anything about this case between Wheeling Pittsburgh Corporation and Massey Energy? If you don't know or are not sure, just say so and I will move on *[n=753]*

Yes, had heard of it before	31%
No, had not heard of it before	68%
DK/NS	1%

4. After West Virginia's Supreme Court heard the appeal by Massey Coal Company of the $75 million dollar judgment against it, photographs of one of the five Supreme Court Justices, Justice Spike Maynard, appeared in the newspapers showing him with Don Blankenship, the head of Massey Energy, while they were both vacationing in the European principality of Monaco. After the photographs appeared in the newspapers, Justice Maynard removed himself from both of the cases in order to avoid the appearance of favoritism toward Massey. Temporary

replacement judges have been brought in to help decide these cases.

Under these circumstances, do you think Justice Maynard should have removed himself from participating in the decisions involving the two Massey companies, or do you think that Justice Maynard should NOT have removed himself and continued to help decide the outcome with the other Justices? If you are not sure, one way or another, just say so *[n=753]*

Maynard should have removed himself	79%
Maynard should have stayed on and helped decide the case	10%
DK/NS	11%

5. Questions have also been raised about whether another Supreme Court Justice should remove himself from these cases, like Justice Maynard did. According to public records, in 2004 Don Blankenship, the head of Massey Energy, spent three and a half million dollars of his own money to help elect Brent Benjamin to the West Virginia Supreme Court. As a result, there have been discussions with whether Justice Benjamin should remove himself from deciding the appeal of both of these cases involving Massey companies. Before just now, have you read or heard anything about this issue? *[n=753]*

Yes	37%
No	60%
DK/NS	3%

6a. *[Randomize Q6a and Q6b with 1/2 getting each]* Thinking first about the $75 million dollar judgment against Massey Coal Company, does the three and a half million dollars the head of Massey Energy spent to help elect Justice Benjamin to the court create doubt in your mind that Justice Benjamin will be fair and impartial, or do you feel he can be fair and impartial?

	Q6a	Q6b	Total Q6	Aware of $3.5 mil in Q5
You have doubts that Justice Benjamin will be fair and impartial	66%	69%	67%	74%
You feel Justice Benjamin can be fair and impartial	15%	15%	15%	19%
DK/NS	19%	16%	18%	7%

6b. *[Randomize Q6a and Q6b, with 1/2 getting each]* Thinking first about the $75 million dollar judgment against Massey Coal Company, do you feel that Justice Benjamin can be fair and impartial, or does the three and a half million dollars the head of Massey Energy spent to help elect Justice Benjamin to the court create doubt in your mind that Justice Benjamin will be fair and impartial?

7a. *[Randomize Q7a and Q7b, with 1/2 getting each]* Thinking now about the $240 million dollar judgment against Massey Energy, does the three and a half million dollars the head of Massey Energy spent to help elect Justice Benjamin to the court create in your mind that Justice Benjamin will be fair and impartial?

	Q7a	Q7b	Total Q7	Aware of $3.5 mil in Q5
You have doubts that Justice Benjamin will be fair and impartial	67%	69%	68%	75%
You feel Justice Benjamin can be fair and impartial	15%	16%	15%	19%
DK/NS	18%	15%	17%	6%

7b. *[Randomize Q7a and Q7b, with 1/2 getting each]* Thinking now about the $240 million dollar judgment against Massey Energy Company, do you feel that Justice Benjamin can be fair and impartial, or does the three and a half million dollars the head of Massey Energy spent to help elect Justice Benjamin to the court create doubt in your mind that Justice Benjamin will be fair and impartial ?

Our last questions are about you and your family. The answers to these questions will help us statistically classify the results we obtain and will only be used when combined with the hundreds of other interviews conducted for this survey. If I come to a question that you prefer not to answer, please just say so, and I will move on to the next question.

D1. May I ask how old you are? *[n=753]*

18-24	5%
25-34	17%
35-44	10%
45-54	24%
55-64	22%
65 or older	20%
Refused	2%

D2. And what was the last grade in school you had the opportunity to complete? *Do not read list [n=753]*

Less than HS degree	6%
HS grad/voc ed	34%
Some college	27%
College graduate	16%
Post grade degree or study	14%
DK/NS	1%
Refused	2%

D3. Do you or anyone in your household work for Harman Mining, Wheeling Pittsburgh Steel Corporation, or any Massey related company? *[If "Yes" ask:]* Which one is that? *[Multiple response OK] [n=753]*

Harman Mining	*
Wheeling Pittsburgh Steel Corporation	1%
Mountain State Carbon, LLC	*
A Massey-related company	3%
DK/NS	6%
No one employed	90%

D4. And which of the following income groups includes your family's total annual income from all sources in 2007? *[Read list except refused and DK/NS] [n=753]*

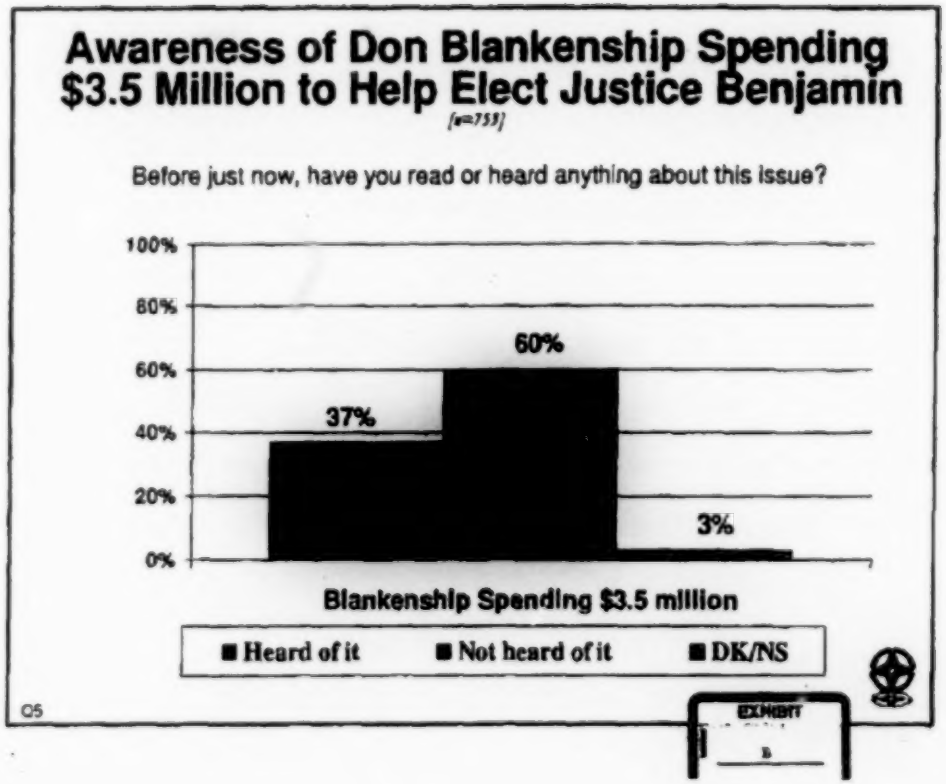
Up to $20,000	9%
$20,000, but less $40,000	18%

$40,000, but less than $60,000	20%	
$60,000, but less than $75,000	14%	
$75,000, but less than $100,000	11%	
$100,000, but less than $150,000	7%	
$150,000 or over	3%	
Refused	15%	⇦ *Do not read*
DK/NS	3%	⇦ *Do not read*

THANK YOU FOR TAKING OUR SURVEY. YOUR ANSWERS HAVE BEEN EXTREMELY HELPFUL

METHODOLOGY

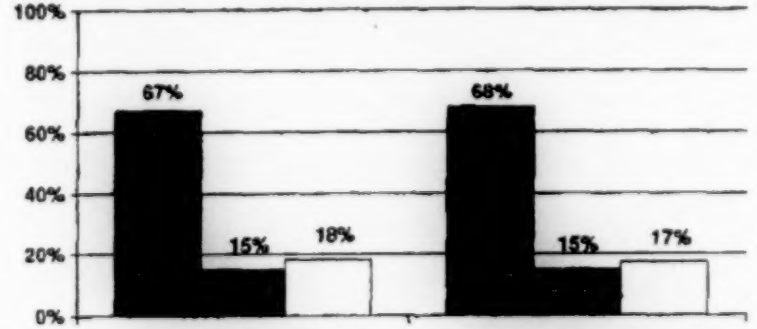
The 2008 West Virginia Judicial Issues Survey was conducted by Talmey-Drake Research & Strategy, Inc., a public opinion and market research firm located in Boulder, CO. The results of this survey are based on 753 random telephone interviews with West Virginia voters, conducted from March 24th to March 27th, 2008. A list of West Virginia voters was obtained, from which a random sample was drawn. Quotas were established to obtain approximately equal representation for men and women, as well as an appropriate represe tion from among the different counties throughout West ginia. A random sample of 753 has a worst-case 95% confidence interval of plus or minus 3.6% about any one reported percentage.


Awareness of Don Blankenship Spending $3.5 Million to Help Elect Justice Benjamin
[n=753]
Before just now, have you read or heard anything about this issue?
100%
80%
60%
40%
20%
0%
37%
60%
3%
Blankenship Spending $3.5 million
Heard of it
Not heard of it
DK/NS
Q5
EXHIBIT

Can Justice Benjamin Be Fair and Impartial in Massey Cases?

[n=753]

". . . . does the $3.5 million the head of Massey Energy spent to help elect Justice Benjamin to the court create doubt in your mind that he will be fair and impartial, or do you feel he can be fair and impartial?"



Q6 & 7

EXHIBIT
C

FILE COPY

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice /s/

Date: April 3, 2008

Case: *A.T. Massey Coal Company, Inc., et al. v. Hugh M. Caperton, et al.; Appeal No. 33350*

Pending: Second Renewed Joint Motion for Disqualification of Justice Benjamin

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Considered is the Second Renewed Joint Motion for Disqualification of Justice Benjamin, filed on March 28, 2008, by counsel of record for Appellee Hugh M. Caperton and by counsel of record for Corporate Appellees in this case. The joint motion proffers information purportedly developed by the parties between March 24 and March 27, 2008.

It is noted that this filing comes nearly four years after the 2004 race in which this Justice was elected by the people of West Virginia; comes over seventeen months after the filing of this appeal with this Court on October 24, 2006; comes over four months after the initial decision of this Court on November 21, 2007, in which this Justice voted with the majority of the Court against the interests of the joint appellees; comes over a month after supplemental briefs were filed and considered on the reconsideration of this appeal; comes over two weeks after oral arguments were heard on the reconsideration of this appeal; and comes over two weeks after this Court's Decision Conference on this appeal's reconsideration.

It is further observed that this joint motion has been filed during the pendency of a 2008 political race in which two seats on the West Virginia Supreme Court of Appeals are to be elected; that the said survey specifically references one candidate in the said race who is a member of this Court and who has recused himself in this case; and that the said survey does not reference another member of this Court who also has recused himself in this case, but who is not a candidate in the said race.

The said motion relies on arguments which relate to the 2004 campaign and which could have been advanced in a timely manner, but have instead been raised now, nearly four years after the 2004 race, during the pendency of a new 2008 political race. Citing no good cause for the delay in raising issues which could have been earlier raised, the said motion is untimely.

Furthermore, a "survey" which appears to be a "push poll" specifically designed with limited information for the purpose of supporting the instant joint motion, is, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.

For these reasons, and for the reasons more fully set forth in my prior memoranda, the pending joint motion seeking my disqualification is DENIED.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April 2008, the following order was made and entered:

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

vs.) No. 33350

A. T. Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his continued refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

No. 33350

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Plaintiffs Below, Appellees,

v.

A.T. MASSEY COAL COMPANY, INC., ELK RUN COAL COMPANY, INC., INDEPENDENCE COAL COMPANY, INC., MARFORK COAL COMPANY, INC., PERFORMANCE COAL COMPANY, AND MASSEY COAL SALES COMPANY, INC.,
Defendants Below, Appellants.

Submitted on Rehearing March 12, 2008.

Filed April 3, 2008.

* * *

Appeal from the Circuit Court of Boone County, Honorable Jay M. Hoke, Judge, Civil Action No. 98-C-192

REVERSED AND REMANDED.

D.C. Offutt, Jr., Stephen Burchett, Perry W. Oxley, David E. Rich, Offutt, Fisher & Nord, Huntington, WV, for Appellants.

Bruce E. Stanley, Tarek F. Abdalla, Reed Smith LLP, Pittsburgh, PA, for Appellee, Hugh M. Caperton.

Robert V. Berthold, Jr., Christina L. Smith, Berthold, Tiano & O'Dell, Charleston, WV, David B. Fawcett, Buchanan Ingersoll & Rooney, Pittsburgh, PA, for Appellees, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.

* * *

Davis, Justice:

The Appellants herein and defendants below, A.T. Massey Coal Company, Inc., and various of its subsidiaries, appeal from a March 15, 2005, order entered in the Circuit Court of Boone County, which denied their post-judgment motions for judgment as a matter of law, a new trial, or remittitur, in response to the entry of a judgment of more than $50 million in favor of the appellees herein, and plaintiffs below, Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales, Inc. In this appeal, A.T. Massey Coal Company and its subsidiaries allege numerous errors that purportedly occurred throughout the proceedings below.

This case is presently before this Court on rehearing.[1] Based upon our thorough consideration of the parties' arguments on rehearing, the relevant

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[1] The opinion formerly filed in connection with this appeal has been vacated based upon the subsequent voluntary disqualification of two of the justices who participated in the earlier proceedings in this Court.

case law and the record on appeal, we again conclude that this case may be resolved on two separate and mutually exclusive grounds. First, we find that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries, based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit. Assuming, *arguendo*, that the circuit court's denial of the motion to dismiss was not in error, we further conclude that the judgment should be reversed based upon the doctrine of res judicata due to an earlier action that had been litigated in Buchanan County, Virginia. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing, with prejudice, this case against A.T. Massey Coal Company and its subsidiaries.

I.

FACTUAL AND PROCEDURAL HISTORY

Central to the dispute underlying this appeal is the Harman Mine, an underground coal mine located in Buchanan County, Virginia, that produced very high quality metallurgical coal. Prior to 1993, Harman Mine was owned by Inspiration Coal Corporation (hereinafter referred to as "Inspiration") through three subsidiaries: Harman Mining Corporation (hereinafter referred to as "Harman Mining"), Sovereign Coal Sales, Inc. (hereinafter referred to as "Sovereign"), and Southern Kentucky Energy Company (hereinafter referred to as "Southern"). For many years, all of the coal from the Harman Mine had been sold to Wellmore Coal Corporation (hereinafter referred to as "Wellmore"), a subsidiary of United Coal Corporation. In April

1992, Sovereign and Southern entered a coal supply agreement (hereinafter referred to as "the 1992 CSA") with Wellmore. Under the 1992 CSA, Wellmore was to purchase from Sovereign and Southern approximately 750,000 tons of coal per year for a period of ten years.

In 1993, Hugh M. Caperton (hereinafter referred to as "Mr. Caperton"), a plaintiff below and appellee herein, formed Harman Development Corporation[2] (hereinafter referred to as "Harman Development").[3] In that same year, Harman Development purchased the three previously mentioned subsidiaries of Inspiration: Harman Mining,[4] Sovereign[5] and Southern, and thereby became the owner of the Harman Mine.[6] Harman Development, Harman

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[2] Harman Development Corporation is a Virginia corporation that has its principal place of business in Beckley, West Virginia.

[3] Mr. Caperton had worked for Sovereign when it was a subsidiary of Inspiration. As Sovereign's employee, Mr. Caperton sold coal on behalf of Sovereign, including coal from the Harman Mine. Mr. Caperton left Sovereign to form his own coal brokerage company, Dominion Energy. Through Dominion Energy, Mr. Caperton continued to broker coal from the Harman Mine on behalf of Inspiration. In 1993, Dominion Energy became Harman Development Corporation.

[4] Harman Mining is a Virginia corporation that transacts business in West Virginia and is a wholly-owned subsidiary of Harman Development.

[5] Sovereign is a Delaware corporation that has its principal place of business in Beckley, West Virginia. Sovereign is a wholly-owned subsidiary of Harman Development.

[6] The plan Harman Development established for the Harman Mine was to mine the reserves in a way that would allow convenient access to adjoining reserves owned by Pittston Coal

Mining and Sovereign are all plaintiffs to this action below, and are appellees herein (hereinafter collectively referred to as "the Harman Companies"). In 1997, in order to fund improvements to the Harman Mine, the Harman Companies sold all the Harman Mine reserves to Penn Virginia Corporation, and then leased back those reserves that could be mined in a cost-effective manner.

From the time the Harman Companies became owners of the Harman Mine until 1997, coal from the Harman Mine was purchased by Wellmore in accordance with the 1992 CSA. Prior to the expiration of the 1992 CSA, in March of 1997, a new CSA with a higher price per ton of coal (hereinafter referred to as "the 1997 CSA") was negotiated between Sovereign, Wellmore and Harman Mining.[7] The 1997 CSA was to be in effect for a period of five years, commencing retroactively on January 1, 1997. However, the 1997 CSA included, among other

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[Footnote continued from previous page]
Company. The appellees explain that it is commonplace in the mining industry for coal companies to sell or lease their properties to other operators when it makes economic sense to allow someone else to mine their coal. Due to the topography of the area, the Harman Mine provided better access to the Pittston reserves than Pittston itself had. Thus, Mr. Caperton hoped to one day lease the Pittston reserves. However, no lease agreement was ever executed between Pittston and any of the Harman Companies.

[7] The 1997 CSA specified that Wellmore would purchase a minimum tonnage of coal, 573,000 tons per year, and also gave Wellmore the option to purchase all of the Harman Mine's production. Historically, Wellmore had purchased all of the coal that the Harman Mine produced.

things, a *force majeure* clause,[8] and a forum-selection clause requiring that "[a]ll actions brought in

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[8] The *force majeure* clause was nearly identical to one that had been included in the 1992 CSA, and stated, in relevant part,

> The term "force majeure" as used herein shall mean any and all causes reasonably beyond the control of SELLER or BUYER, as applicable, which cause SELLER or BUYER to fail to perform hereunder, such as, but not limited to, acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER. . . . Pertaining to BUYER, the term "force majeure" as used herein shall further include occurrence(s) of a force majeure event at any of BUYER's customer's plants and facilities, except that the effects of any such force majeure event shall not justify BUYER in reducing its purchase of coal hereunder in greater proportion than the coal to be purchased hereunder bears to all BUYER's sources of supply, including BUYER's own mines, for BUYER's metallurgical coal sold to domestic coke producers. SELLER and BUYER shall promptly notify the other following commencement of a force majeure. If because of a force majeure SELLER or BUYER, respectively, is unable to carry out its obligations under this Agreement and if such Party shall promptly give to the other Party written notice of

connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia."[9]

During the course of the 1992 CSA, and at the time the 1997 CSA was executed, one of Wellmore's primary customers was LTV Steel (hereinafter referred to as "LTV"). Wellmore sold and shipped nearly two-thirds of the coal it purchased from the Harman Companies to LTV's coke plant located in Pittsburgh, Pennsylvania.[10] On July 19, 1997, LTV announced that it intended to close its Pittsburgh coke plant due to a change in emissions regulations promulgated by the Environmental Protection Agency.

A.T. Massey Coal Company (hereinafter referred to as "Massey"), a defendant below and appellant herein, had tried unsuccessfully for several years to

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[Footnote continued from previous page]

> such force majeure, then the obligations of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by such force majeure and during its continuance; provided however, (i) that such obligations shall be suspended only to the extent made necessary by such force majeure and only during its continuance, and (ii) that the Party giving such notice shall act promptly in [sic] reasonable manner to eliminate such force majeure. . . .

9 This forum-selection clause is identical to one that had been included in the 1992 CSA.

10 LTV purchased from Wellmore a premium blend of coal from the Harman Mine mixed with other, lesser quality coals. The circuit court expressly found that "[c]oal from the Harman Mine is metallurgical coal with very favorable coking characteristics prized by steelmakers like LTV."

sell its West Virginia mined coal directly to LTV.[11] Due to its lack of success in selling to LTV on its own, Massey determined to acquire LTV's supplier, Wellmore, and its parent corporation, United Coal Corporation (hereinafter referred to as "United").[12] Massey purchased Wellmore and United on July 31, 1997. Since there was no long-term agreement between LTV and Wellmore, Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. An internal Massey memorandum admitted during trial revealed that Massey understood there were risks to its plan, most notably the possibility that the relationship between LTV and Wellmore might not continue under Massey ownership of Wellmore. The circuit court found that, in spite of this risk, and despite the knowledge that LTV was "extremely reluctant to change a long-established, successful coal blend" that included coal from the Harman Mine, Massey nevertheless "provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract."[13] As a consequence of Massey's actions,

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[11] This coal was inferior in quality to the coal obtained from the Harman Mine and sold to LTV through Wellmore.

[12] The Harman Companies and Mr. Caperton presented evidence at trial to establish that Massey had for some time desired to sell coal to LTV, and opined that it was this desire that motivated Massey's acquisition of Wellmore, and further motivated Massey to eliminate the Harman Companies as its competitors via the destruction of those companies.

[13] Massey made these demands notwithstanding its knowledge that LTV had historically demonstrated a preference for multiple suppliers and had not entered multi-year coal

LTV ceased buying coal from Wellmore. Thereafter, on August 5, 1997, Wellmore, at the direction of Massey, gave notice to the Harman Companies by letter stating that if LTV did in fact close its Pittsburgh plant, then Wellmore anticipated a pro rata reduction in tonnage under the *force majeure* clause of the 1997 CSA.

Subsequent to Wellmore's August 5th letter, Massey entered into negotiations with the Harman Companies for the purchase of the Harman Mine. During the course of these negotiations, confidential information regarding the Harman Mine's operations, including its desire to eventually mine adjoining Pittston reserves,[14] as well as confidential information pertaining to the finances of the Harman Companies and of Mr. Caperton, personally, was shared with Massey. The Harman Companies also expressed to Massey their disagreement that the LTV closure of its Pittsburgh coke plant constituted a *force majeure* event.

Thereafter, on December 1, 1997, Wellmore, at Massey's direction, declared *force majeure* based on LTV's closure of its Pittsburgh coke plant, and advised the Harman Companies that it would purchase only 205,707 tons of the 573,000 minimum tons of coal required under the 1997 CSA. According to the express findings of the circuit court on this point,

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[Footnote continued from previous page]
supply contracts. Additionally, the firm price for its coal that Massey quoted to LTV represented "a handsome improvement" over the prices at which Massey had been selling its coal.

14 *See supra* note 6.

> [o]nly after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare "force majeure" against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare "force majeure" based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of "force majeure", Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

Massey continued in negotiations with the Harman Companies and Mr. Caperton for Massey's purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, "ultimately collapsed the transaction in such a manner so as to increase [the Harman Companies'] financial distress."[15] In addition, Massey utilized

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[15] According to testimony presented at trial, during the negotiations of Massey's potential purchase of the Harman Mine, Massey represented that it would assume the Harman

the confidential information it had obtained from the Harman Companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine in order to make the Harman Mine unattractive to others and thereby decrease its value. During the negotiations for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Harman Companies' obligations.[16] Subsequently, the Harman Companies filed for bankruptcy.

Thereafter, in May 1998, Harman Mining and Sovereign sued Wellmore in the Circuit Court of Buchanan County, Virginia, alleging causes of action for breach of contract and for breach of the covenant of good faith and fair dealing arising from Wellmore's declaration of *force majeure*. However, Harman

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[Footnote continued from previous page]
coal reserves lease from Penn Virginia "as-is." However, just prior to the scheduled closing of Massey's purchase of the Harman Mine, Massey demanded changes to numerous material terms of the Harman Companies' lease agreement with Penn Virginia. Massey and Penn Virginia could not agree on terms; therefore, Massey's purchase of the Harman Mine was never completed.

16 Mr. Caperton had personal obligations to Inspiration Coal (now known as Terra Industries), Senstar Financial, Grundy National Bank, and Vision Financial, among others. The circuit court expressly found that many of the steps Massey took were directed at Mr. Caperton personally, and that Mr. Caperton had relied to his detriment on numerous false representations made by Massey. One example of such false representations made by Massey was that it lead Mr. Caperton to believe that it intended to close its purchase of the Harman Mine on January 31, 1998, when, in fact, Massey had already determined not to close the transaction.

Mining and Sovereign voluntarily withdrew their tort claim prior to trial. Following trial on the contract claim, a jury found in favor of Harman Mining and Sovereign and awarded $6 million in damages.[17]

Shortly after the Virginia action was filed, on October 29, 1998, Harman Development, Harman Mining, Sovereign and Mr. Caperton, individually, filed the instant action in the Circuit Court of Boone County, West Virginia, against A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., MarFork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. (hereinafter collectively referred to as "the Massey Defendants").[18] The first amended complaint in this action was filed on December 10, 1998, and asserted claims of tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentation, civil conspiracy, negligent misrepresentation, and punitive damages. Though numerous pre-trial motions were filed in the underlying action, two in particular are relevant to our resolution of this matter. First, in December 1998, the Massey Defendants filed a motion to

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[17] Wellmore appealed the verdict to the Supreme Court of Virginia, however the appeal was refused on technical grounds. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002).

[18] Elk Run Coal Company, Inc., Independence Coal Company, Inc., Mar Fork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., are all subsidiaries of A.T. Massey Coal Company, Inc.

dismiss. In their memorandum in support of the motion, the Massey Defendants argued, *inter alia*, that the forum-selection clause of the 1997 CSA required this action to be filed in Buchanan County, Virginia. The circuit court denied the Massey Defendants' motion to dismiss. Thereafter, in April 2002, the Massey Defendants filed a motion for summary judgment, arguing, in relevant part, that the instant action was barred under the legal principal of res judicata. The circuit court denied this motion as well.

Ultimately, only three of the theories of liability asserted in this action were presented to the jury for a verdict:[19] tortious interference, fraudulent misrepresentation and fraudulent concealment. On August 1, 2002, the jury found in favor of all plaintiffs on all three grounds and returned a verdict, including punitive damages, of $50,038,406.00. On August 30, 2002, the Massey Defendants filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, remittitur. Following a lengthy delay, by order entered March 17, 2005, the circuit court denied the post-trial motions. This appeal followed.[20]

II.

STANDARD OF REVIEW

Our analysis of this case will consider two issues: first, whether the circuit court erred in denying the Massey Defendants' motion to dismiss on the issue of

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[19] The punitive damages claim was presented also.

[20] There were additional delays in this case involving the trial transcript. The circuit court certified the transcript on August 25, 2006. This appeal was then filed on October 24, 2006.

the forum-selection clause, and, in the alternative, whether the circuit court erred in denying the Massey Defendants' motion for summary judgment on the issue of res judicata.

We first review the correctness of the circuit court's denial of the Massey Defendants' motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA. "This Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005).[21] However, we now hold that "[o]ur review of the applicability and enforceability of [a] forum[-]selection clause is *de novo*." *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993) (citing *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir. 1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992)). *Cf.* Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

We next consider the circuit court's denial of the Massey Defendants' motion for summary judgment on the issue of res judicata. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755

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21 "Courts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5], at 376 (2d ed. 2006).

(1994). For purposes of our *de novo* review, we further note that

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter*. Finally, we note that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*. With these considerations in mind, we proceed to address the dispositive issues raised in this appeal.

III.

DISCUSSION

Although numerous issues have been raised on appeal in this case, we find that the instant matter may be resolved on the issue of the forum-selection clause contained in the 1997 CSA between Sovereign Coal Sales, Inc., Wellmore Coal Corporation and Harman Mining Corporation. In the alternative, this case may be resolved based on the doctrine of res judicata. We address each of these issues in turn.

A. Forum-Selection Clause

The 1997 CSA between Sovereign, Wellmore and Harman Mining provided that the "[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of

the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia. . . ." In the proceeding below, the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant action should therefore be dismissed.[22] The circuit court denied the motion to dismiss.

This case presents the first opportunity for this Court to address substantive issues involving forum-selection clauses. By way of definition, it has been recognized that "[a] 'forum selection' provision in a contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." 17A Am. Jur. 2d *Contracts* § 259, at 255 (2004) (footnote omitted). While forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable:

> The right of an injured party to legal redress is jealously guarded by the courts. Formerly, no agreement confining the right of a party to

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[22] "A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit." *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) (citations omitted).

> sue in a particular court or tribunal or in the courts or tribunals of a certain jurisdiction, or to determine the venue of a suit in such a way as to deprive the defendant of his statutory privileges as to place of trial was enforced, unless perhaps where the agreement was made after the cause of action had arisen and was part of a fair compromise. A minority of courts still follow this older rule.
>
> During the past two decades, the rules governing the validity of various "forum selection" clauses have been relaxed considerably, the courts following a pattern similar to that which has already been discussed in connection with arbitration clauses. Thus, while it remains true today that a clause or provision *unreasonably or improperly* attempting to deprive a court of its jurisdiction will not be enforced, the modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. This trend is directly traceable to the landmark case of *M/S Bremen v. Zapata Off-Shore Co.*, [407 U.S. 1, 92 S.Ct. 1907, 32 L. Ed. 2d 513 (1972)], in which the United States Supreme Court upheld the validity of a freely negotiated forum selection clause in a commercial contract between an American firm and a German concern, which specified that any dispute must be determined by the English courts. . . .

7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 15:15, at 290-301 (4th ed.

1997)(footnotes omitted). *See also* 17A Am. Jur. 2d *Contracts* § 259, at 255-56 ("While there is contrary authority, generally modern courts will enforce forum-selection clauses entered into by parties to a contract provided that the clauses are not unfair, unreasonable, or unjust under [the] circumstances." (footnotes omitted)).

Although this Court has not had occasion to address substantive issues involving forum-selection clauses, we have previously indicated our general approval of forum-selection clauses by noting that they are not contrary to public policy:

> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. Va. Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W. Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W. Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller, Inc.*, 159 W. Va. 120, 221 S.E.2d 882 (1975). . . .
>
> As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. "Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to

> be reasonable and just." *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F. Supp. 1011, 1015 (S.D. W. Va. 1976). *See also, Kolendo v. Jarell, Inc.*, 489 F. Supp. 983 (S.D. W. Va.1980).

General Elec. Co. v. Keyser, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(3)[5], at 376-77 (2d ed. 2006) (hereinafter referred to as "*Litigation Handbook*") ("The Supreme Court has indicated in passing that forum selection clauses are not contrary to public policy." (citing *General Electric Co. v. Keyser*)).

Having found no impediment to the enforcement of forum-selection clauses in general, we now must endeavor to specifically determine whether the forum-selection clause of the 1997 CSA should have been enforced in the instant case.

In *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit articulated a four-part test for determining whether a claim should be dismissed based upon a forum-selection clause. We find this test supported by reason and logic, and by the manner in which such cases have been resolved in other courts; therefore, we now hold that

> [d]etermining whether to dismiss a claim based on a forum[-]selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. . . . The second step requires [classification of] the clause as mandatory or

> permissive, *i.e.*, . . . whether the parties are required to bring any dispute to the designated forum or [are] simply *permitted* to do so. [The third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . .
>
> If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching."

Phillips, 494 F.3d at 383-84 (internal citations omitted) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972)). *See also Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) ("Having found that the forum selection clause in the Consulting Agreement is valid, binding, and enforceable, we must next consider whether it applies to any or all of Dexter's claims against Baan."); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 (Tex. App. 2007) ("In deciding whether to enforce a mandatory forum-selection clause, courts must determine whether the claims in the case at hand fall within the scope of the forum-selection clause and whether the court should enforce the clause. In addition to resolving issues of scope and enforceability, courts also may have to decide issues

as to whether nonsignatories to the contract can enforce the forum-selection clause contained therein."). We now follow this analysis to ascertain whether the instant case should have been dismissed pursuant to the forum selection clause.

1. **Reasonably Communicated**. The first question we must answer is whether the forum-selection clause was reasonably communicated to Mr. Caperton and the Harman Companies. "Although a strong presumption of enforceability attaches to forum selection clauses, *see M/S Bremen*, 407 U.S. at 15, 92 S.Ct. 1907, '[t]he legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff. . . .' "*Electroplated Metal Solutions, Inc. v. American Servs., Inc.*, 500 F. Supp. 2d 974, 976 (N.D. Ill. 2007)(internal citation omitted) (quoting *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995)). *See also* 17A C.J.S. *Contracts* § 237, at 211 (1999) ("A forum selection clause is unenforceable as to a plaintiff who did not have sufficient notice of the forum selection clause prior to entering the contract.").

This prong of the analysis is easily resolved as Mr. Caperton and the Harman Companies have not argued that the forum-selection clause was not reasonably communicated to them. Furthermore, Sovereign and Harman Mining were parties to the agreement, and Mr. Caperton signed the contract in his capacity as president of Sovereign. Therefore, these parties cannot claim ignorance of the plainly worded forum-selection clause, which "clearly convey[ed] to any reader that any action regarding the [CSA] must be brought in a specific court, and the location of that court [was] readily ascertainable. . . ." *Klotz v. Xerox Corp.*, No. 07 CIV

1734 (GEL), ___ F. Supp. 2d ___, ___, 2007 WL 3100220, at *2 (S.D.N.Y. Oct. 22, 2007). Moreover, though Harman Development, the parent company of Sovereign and Harman Mining, was not a party to the 1997 CSA, Mr. Caperton is the sole owner of Harman Development. Since Mr. Caperton had knowledge of the clause, Harman Development is deemed to have knowledge of the clause. *See Clark v. Milam*, 192 W. Va. 398, 402, 452 S.E.2d 714, 718 (1994) ("Generally, a corporation 'knows,' or 'discovers,' what its officers and directors know."). Thus, we find sufficient evidence in the record of this case to establish that the forum-selection clause was reasonably communicated to those who now resist its application.

2. Mandatory or Permissive. The second step in our analysis is to determine whether the forum-selection clause is mandatory or permissive. It has been widely recognized, and we now expressly hold that "[t]here are two types of forum[-]selection clauses: mandatory and permissive. A mandatory forum[-]selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum[-]selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere." *Litigation Handbook* § 12(b)(3)[5], at 376 (footnote omitted) (citing *K. & V. Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494 (10th Cir. 2002)). *See also Weisser v. PNC Bank, N.A.*, No. 3D07-487, ___ So.2d ___, 2007 WL 2848118, at *2 (Fla. Dist. Ct. App. 2007) (" 'Permissive [forum selection] clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.'

. . . In contrast, mandatory forum selection clauses provide 'for a mandatory and exclusive place for future litigation.'" (citations omitted)); *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 (NAM) (GJD), ___ F. Supp. 2d ___, 2007 WL 2891981, at *8 (N.D.N.Y. 2007) ("A mandatory forum selection clause grants exclusive jurisdiction to a selected forum and should control absent a strong showing that it should be set aside. . . . In contrast, 'a permissive forum selection clause indicates the contracting parties' consent to resolve their dispute in a given forum, but does not require the dispute to be resolved in that forum . . . .'" (internal citations omitted)).

Resolution of the question of whether a forum-selection clause is mandatory or permissive requires scrutiny of the particular language used.

> In determining whether a forum selection clause is mandatory or permissive, the language of the clause must be examined. For example, in *Quinones*, the Florida Supreme Court found that the forum selection clause was permissive, not mandatory, because it provided that the creditor **"may"** institute legal proceedings in specified courts, not that it **"shall"** do so. [*Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 275 (Fla. 1987)] (emphasis added). . . ." Conversely forum selection clauses which state or clearly indicate that any litigation **must** or **shall** be initiated in a specified forum are mandatory." *Shoppes Ltd. [P'ship v. Conn*, 829 So.2d 356, 358 (Fla. Dist. Ct. App. 2002)] (emphasis added) (citing *Mgmt. Computer Controls, Inc.*

> *v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. 1st DCA 1999)).

Weisser, 2007 WL 2848118, at *2-3. The *Weisser* Court also cited *Regal Kitchens, Inc. v. O'Connor & Taylor Condominium Construction, Inc.*, 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005), wherein the court examined a forum-selection clause which stated that "[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, *with proper venue in Palm Beach County*." (Emphasis added). The *Regal Kitchens* Court observed that the clause was mandatory as to the law to be applied, but permissive as to the forum, commenting that,

> [i]n the instant case, although the venue clause unequivocally states that Florida law shall apply to any litigation of the subcontract, it lacks mandatory language or words of exclusivity to show that venue is proper only in Palm Beach County. *See Shoppes Ltd. P'ship v. Conn.*, 829 So. 2d at 357-58. That is to say, this clause does not unequivocally mandate that a controversy or dispute be litigated in Palm Beach County, nor does it waive any other territorial jurisdiction. The language merely allows a party to file suit in Palm Beach County.

894 So. 2d at 291-92.

Thus, to be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.

> A forum selection clause is mandatory if jurisdiction and venue are specified with

> mandatory or exclusive language. *John Boutari & Sons, Wine & Spirits, S.A. v. Attiki Imp. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994). In *Boutari*, the Second Circuit held that "[t]he general rule in cases containing forum selection clauses is that [w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." *Boutari*, 22 F.3d at 52. . . .

Great N. Ins. Co., 2007 WL 2891981, at *8 (additional citations omitted). *See also K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494, 499 (10th Cir. 2002) ("'[W]here venue is specified [in a forum-selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum-selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.'" (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992)). *See also Printing Servs. of Greensboro, Inc. v. American Capital Group, Inc.*, 637 S.E.2d 230, 232 (N.C. Ct. App. 2006) ("'[T]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.'" (quoting

MarkGroup Int'l, Inc. v. Still, 566 S.E.2d 160, 161 (N.C. Ct. App. 2002))).

An example of a case illustrating a forum-selection clause that used mandatory language is *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). In that case, the plaintiff entered into a contract with the defendant to distribute equipment manufactured by the defendant. The contract contained a forum-selection clause that contained the following pertinent language: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." *Docksider*, 875 F.2d at 763. A dispute arose over the contract that resulted in the plaintiff filing an action against the defendant in a federal district court in California. The district court dismissed the action on the grounds that the forum-selection clause required the case be filed in a Virginia court. The plaintiff appealed on the grounds that the forum-selection clause was permissive, not mandatory. The Court of Appeals for the Ninth Circuit disagreed with the plaintiff, ruling as follows:

> The critical language in [the clause] is the final sentence: "Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." The district judge concluded that this language represented the parties' intent to pursue any litigation that arose only in Virginia. [Plaintiff] contends that this interpretation is erroneous because the contractual language does not contain any express mandatory term such as "exclusively" that would indicate the parties' intent to vest Virginia with exclusive

> jurisdiction. [Plaintiff] has cited numerous cases as support for this position, relying principally on *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987).
>
> . . . .
>
> *Hunt Wesson* is distinguishable because the forum selection clause underlying this action contains the additional sentence stating that "[v]enue of any action brought hereunder shall be deemed to be in . . . Virginia." This language requires enforcement of the clause because [plaintiff] not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in Virginia.

Docksider, 875 F.2d at 763-64.

In accordance with the foregoing authorities, we now hold that the determination of whether a forum-selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall,"[23] or exclusive terms such as

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[23] This Court has often recognized that " '[i]t is well established that the word "shall," in the absence of language . . . showing a contrary intent . . . , should be afforded a mandatory

"sole," "only," or "exclusive," the clause will be enforced as a mandatory forum-selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.

Turning to the instant case, the forum-selection clause utilized mandatory language that identified the jurisdiction wherein disputes would be tried: "[a]ll actions brought in connection with this Agreement *shall* be filed in and decided by the Circuit Court of Buchanan County, Virginia." (Emphasis added). Accordingly, we are presented with a mandatory forum-selection clause. *See Ex parte Bad Toys Holdings, Inc.*, 958 So. 2d 852, 856 (Ala. 2006) ("The forum-selection clause in the purchase agreement provides that '[v]enue for any legal action which may be brought hereunder *shall* be deemed to lie in Sullivan County, Tennessee' (emphasis added). The . . . use of the word 'shall' in the forum-selection clause makes the clause mandatory, not permissive."); *Town of Homer v. United Healthcare of Louisiana, Inc.*, 948 So. 2d 1163, 1167 (La. Ct. App. 2007) ("We find the forum selection clause at issue to be clear and explicit. The clause expressly states that the proper venue for ***any legal action shall*** be East Baton Rouge Parish. There is no ambiguity in this mandatory provision."); *Polk County Recreational Ass'n v. Susquehanna*

[Footnote continued from previous page]
connotation.' " Syl. pt. 1, in part, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). *See also State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)).

Patriot Commercial Leasing Co., Inc., 734 N.W.2d 750, 758 (Neb. 2007) ("The forum selection clause in the Thornridge lease provides that any action concerning the lease 'shall be' brought in Pennsylvania. We read this forum selection clause to be a mandatory clause. . . ."); *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) ("Because the clause states that 'all' disputes 'shall' be at Siempelkamp's principal place of business, it selects German court jurisdiction exclusively and is mandatory."). Having determined that the forum-selection clause at issue in this case is a mandatory clause, we must now determine whether the claims and parties involved in the suit are governed by said clause.

3. Claims and Parties. The third part of our analysis is to determine whether the claims and parties involved in the suit are governed by the forum-selection clause. We address these questions separately.

a. Are the claims asserted in the instant suit subject to the forum-selection clause? Mr. Caperton and the Harman Companies have argued that the claims asserted in this action are not governed by the forum-selection clause because they are tort, as opposed to contract, claims. We disagree.

It has been recognized that,

> [w]hen a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause. . . . The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 687-88 (Tex. App. 2007) (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221-22 (5th Cir. 1998)). *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 388 (2d Cir. 2007) ("[W]hen ascertaining the applicability of a contractual provision to particular claims, we examine the substance of those claims, shorn of their labels."). Accordingly, we expressly hold that, to determine whether certain claims fall within the scope of a mandatory forum-selection clause, the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.

Turning to the case at hand, we must first examine the language of the mandatory forum-selection clause at issue. Because the 1997 CSA expressly states that it "shall be . . . construed . . . in accordance with the substantive laws of the Commonwealth of Virginia," we will scrutinize the language of the clause pursuant to Virginia law. Notably, under Virginia law, "[w]ritten contracts are construed as written, without adding terms that were not included by the parties. When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words that the parties used are normally given their usual, ordinary and popular meaning." *Heron v. Transportation Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007).

The forum-selection clause of the 1997 CSA states in plain language that it applies to "[a]ll actions brought in connection with this Agreement." Due to the inclusion of the phrase "all actions," we perceive no intent by the parties to this agreement to

limit in any way the type of actions to which it applies. Thus, for example, it would apply equally to contract claims, tort claims and statutory claims, so long as such claims are "brought in connection with" the 1997 CSA.

Considering next the "usual, ordinary and popular meaning" of the phrase "in connection with," we find the intended scope of the forum-selection clause to be quite broad. *Heron*, 650 S.E.2d at 702. The word "connection" in the context herein used, is generally understood to mean "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in another." II The Oxford English Dictionary 838-39 (1970 reissue). *See also* Random House Webster's Unabridged Dictionary 431-32 (2d ed. 1998) (defining "connection" in part as "association; relationship . . ."); Webster's Third New International Dictionary 481 (1993) (defining "connection" in relevant part as "the state of being connected or linked . . . relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)"). Thus, so long as the claims asserted in this action bear a logical relationship to the 1997 CSA, they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law.

Other courts considering forum-selection clauses that contained broad language such as that used in the instant clause have similarly determined that the clauses were not intended to apply merely to breach of contract claims, but rather were intended to apply to other claims as well. For example, the United States Court of Appeals for the Second

Circuit was asked to determine the scope of a forum-selection clause that stated: "'any legal proceedings that may arise out of [the agreement] are to be brought in England.'" *Phillips*, 494 F.3d at 382. In determining the meaning of "arise out of," the court contrasted language such as "in connection with" as being more expansive: "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or '*arise in connection with*' the contract." *Id.*, 494 F.3d at 389 (emphasis added) (citations omitted). In a different case, the Second Circuit also rejected an interpretation of a forum-selection clause that utilized the phrase "in connection with" as applying only to breach of contract claims:

> There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, . . . with respect to the forum selection clauses, in terms of submission for "all purposes of and *in connection with*" the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir. 1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974), held that controversies and claims "arising

> out of" a contract for the sale of a business covered securities violations related to that sale. *Id.*, 417 U.S. at 519-20, 94 S.Ct. at 2457. We find no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the [Appellants'] contention that only allegations of contractual violations fall within the scope of the clauses.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993).

Given the similarities between the phrases "in connection with" and "in relation to," we also note that the Third Circuit has reasoned,

> In this case, we must interpret the provision in the forum selection clause that gives the English courts exclusive jurisdiction over "any dispute arising . . . in relation to" the 1990 Agreement. The ordinary meaning of the phrase "arising in relation to" is simple. To say that a dispute "arise[s] . . . in relation to" the 1990 Agreement is to say that the origin of the dispute is related to that agreement, *i.e.*, that the origin of the dispute has some "logical or causal connection" to the 1990 Agreement. *Webster's Third New International Dictionary*, 1916 (1971).

John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997). *See also Klotz v. Xerox Corp.*, No. 07 CIV 1734(GEL), ___ F. Supp. 2d ___, ___ & n.4, 2007 WL 3100220, at *2 & n.4 (S.D.N.Y Oct. 22, 2007) (concluding that "[p]laintiff raises no challenge to the scope of the forum selection clause, nor could she, since the expansive

language of the provision--covering '[a]ny action in connection with the Plan by an Employee'--plainly encompasses her claims"; and further commenting that "[p]laintiff's state law tort and contract claims are also part of an 'action in connection with the Plan' and are covered by the clause" (footnote omitted)); *Doe v. Seacamp Assoc., Inc.*, 276 F. Supp. 2d 222, 227 (D. Mass. 2003) ("A review of the case law leads me to conclude that the tort claims, too, are covered by the forum selection clause. The forum selection clause was worded to indicate that it governed any claim related to or arising from a contract, the subject of which were the terms and conditions of John Doe's enrollment at Seacamp."); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (finding tort and statutory claims were subject to forum-selection clause).

Turning to the instant case, we note that the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were: (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment. Based upon our review of these tort claims, we conclude that they were indeed "brought in connection with" the 1997 CSA.

All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore's declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA. While the amended complaint methodically sets out numerous details of purported pre-*force majeure* wrongful conduct, no injury resulted from any of that alleged conduct without the declaration of *force majeure* under the 1997 CSA.

For example, "Count I" of the amended complaint alleges tortious interference with existing contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants. Thus, this claim is "brought in connection with" the 1997 CSA.

"Count II" of the amended complaint alleged tortious interference with prospective contractual relations, again involving Wellmore, Penn Virginia and the UMWA. As with Count I, the key to these claims remains Wellmore's wrongful declaration of *force majeure*. In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey. Therefore this claim is "brought in connection with" the 1997 CSA.

Finally, "Count III" alleges fraudulent misrepresentation, deceit and concealment either related to the declaration of *force majeure* itself or related to subsequent negotiations between the Harman Companies and the Massey Defendants "regarding their intentions to enter into a settlement agreement with Harman in connection with the 1997 CSA." Insofar as this claim either relates directly to the declaration of *force majeure* under the 1997 CSA, or to the parties' efforts to reach a settlement with respect to the 1997 CSA, it is "brought in connection with" the 1997 CSA.

Accordingly, because none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore's declaration of *force majeure* under the 1997 CSA, these claims are all "brought in connection with" the 1997 CSA and, as a consequence, are within the scope of the forum-selection clause contained therein.[24]

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[24] Some courts have concluded that a forum-selection clause is applicable to tort claims only where the resolution of the claim requires interpretation of the contract. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) ("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." (citing *Weidner Communications, Inc. v. Faisal*, 671 F. Supp. 531, 537 (N.D. Ill. 1987); *Berrett v. Life Ins. Co.*, 623 F. Supp. 946, 948-49 (D. Utah 1985); *Clinton v. Janger*, 583 F. Supp. 284, 288 (N.D. Ill. 1984))). While we might agree with this proposition were we presented with a more narrowly tailored forum-selection clause applying to claims "arising under" or "arising out of" the contract, we see no need for such a narrow rule in the context of a broadly worded forum-selection clause such as the one presently before us. Nevertheless, we do note that, insofar as the claims asserted in this action all flow from the allegedly

b. Are the parties involved in the suit subject to the forum-selection clause? The Harman Companies and Mr. Caperton have argued that, as strangers to the 1997 CSA, the Massey Defendants are precluded from enforcing its terms as they are not third-party beneficiaries of the contract. The Harman Companies and Mr. Caperton further argued that two of the plaintiffs to this action, Harman Development and Mr. Caperton (in his individual capacity), are not signatories to the 1997 CSA and, therefore, may not be bound by its terms. We disagree.

Other courts addressing the issue of whether non-signatories to a contract may enforce, or be subject to, a forum-selection clause have found the clauses to be enforceable under certain circumstances. One such case is *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). The *Manetti-Farrow* case involved a contract between a California corporation, Manetti-Farrow, and Gucci Parfums, an Italian corporation that was a subsidiary of another Italian corporation, Guccio Gucci, S.p.A. (hereinafter referred to as "Guccio Gucci"). The contract included a forum-selection clause that stated: "[f]or any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction." *Manetti-Farrow*, 858 F.2d at 511. Another company, Gucci America, signed a consent and ratification agreement, in which it consented to the contract

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[Footnote continued from previous page]
wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful.

between Manetti-Farrow and Gucci Parfums. Ultimately a dispute arose, and Manetti-Farrow filed suit in California alleging numerous causes of action, not only against Gucci Parfums and Gucci America, but also against the parent company, Guccio Gucci, as well as numerous officers of these companies. *Manetti-Farrow*, 858 F.2d at 511-12. Upholding the district court's dismissal based upon the forum-selection clause, the Ninth Circuit found that a forum-selection clause was applicable to "a range of transaction participants" who were "closely related to the contractual relationship":

> Manetti-Farrow argues the forum selection clause can only apply to Gucci Parfums, which was the only defendant to sign the contract. However, "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-03 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983)). We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants.

858 F.2d at 514 n.5.

Similarly, in *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), it was argued that two corporate plaintiffs to a lawsuit, GCM and OMI, were not parties to the contract containing the forum-selection clause (which plaintiff Hugel had signed), and therefore, were not bound by the clause.

In rejecting the argument, the court relied on the companies' close relationship to the agreement and the foreseeability that they would be bound by the forum-selection clause:[25]

> In order to bind a non-party to a forum selection clause, the party must be "closely related" to the dispute such that it becomes "foreseeable" that it will be bound. . . . Hugel is President and Chairman of the Board of both GCM and OMI. In addition, Hugel owns 99% of the stock of GCM which, in turn, owns 100% of the stock of OMI. The alleged assurances of confidentiality were made to Hugel alone and Hugel alone decided that his corporations would participate in Lloyd's investigation.
>
> Hugel and Lloyd's contracted to settle all of their disputes in England. Although GCM and OMI were not members of Lloyd's, in the course of a dispute between Hugel and Lloyd's, Hugel alone involved his two controlled corporations and supplied information allegedly belonging to those

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25 The contract dispute in the *Hugel* case arose after plaintiff Dieter Hugel became a member of the Corporation of Lloyd's. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 207 (7th Cir. 1993). Hugel signed a membership contract that included the forum-selection clause. *Id.* Thereafter, Lloyd's became suspicious that Hugel and GCM were involved in criminal misconduct and initiated an investigation. *Id.* Hugel cooperated with the investigation and provided confidential information pertaining to GCM and OMI. In the subsequent lawsuit, plaintiffs Hugel, GCM and OMI claimed that "they lost business as the result of Lloyd's breach of confidentiality relating to the investigation." *Id.*

> corporations. . The district court found that the corporations owned and controlled by Hugel are so closely related to the dispute that they are equally bound by the forum selection clause and must sue in the same court in which Hugel agreed to sue. We hold these findings are not clearly erroneous.

999 F.2d at 209-10. Furthermore, the *Hugel* court made clear that a non-party to a contract need not be a third-party beneficiary in order for the forum-selection clause to be binding against such non-party:

> Plaintiffs argue that the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by definition, satisfy the "closely related" and "foreseeability" requirements, *see e.g.*, *Coastal Steel*, 709 F.2d at 203 (refusing to absolve a third-party beneficiary from the strictures of a forum selection clause which was foreseeable); *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984), *a third-party beneficiary status is not required.*

Hugel, 999 F.2d at 209-10 n.7 (emphasis added).[26]

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[26] *But see Pixel Enhancement Labs., Inc. v. McGee*, 1998 WL 518187, at *2 (D. Mass. 1998) ("As McGee is not a third party beneficiary of the License Agreement, he has no standing to assert its forum selection clause. *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) ("[T]hird party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to non-signatories).").

In another case, *Great Northern Insurance Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882 NAM GJD, ___ F. Supp. 2d ___, 2007 WL 2891981 (N.D.N.Y. Sept. 28, 2007), two German companies entered into a supply agreement whereby Constab Polymer-Chemie (hereinafter referred to as "Constab") would supply products used to produce photo paper to Feliz Schoeller GmbH & Co. and its subsidiaries, one of which was Schoeller-USA. ___ F. Supp. 2d at ___, 2007 WL 2891981, at *1. The contract included a forum-selection clause specifying that jurisdiction of certain disputes would be in Warstein, Germany. *Id.*, ___ F. Supp. 2d at ___, 2007 WL 2891981, at *7. Constab provided defective products to Schoeller USA, and Schoeller USA, through its insurer, filed suit in California.[27] In rejecting the argument that, as non-parties to the contract Great Northern and Schoeller-USA could not enforce the forum-selection clause, the court reasoned,

> [n]either Great Northern nor [its insured] Schoeller-USA are signatories to the Agreement. However, the enforcement of the forum selection clause is clearly "foreseeable" given the relationships between the parties and the basis upon which plaintiff has commenced this suit. Therefore, the Court finds that the forum selection clause may be invoked against plaintiff. . . .

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[27] Great Northern provided indemnity insurance to Schoeller-USA and, in accordance with the insurance policy, compensated Schoeller-USA for its losses resulting from the defective product and became subrogated to Schoeller-USA's rights.

___ F. Supp. 2d at ___, 2007 WL 2891981, at *8. *See also Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006) (enforcing forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted from the performance of the contract); *Marano Enters. of Kansas v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (concluding non-signatory to contract was "closely related to the disputes arising out of the agreements and properly bound by the forum-selection provisions" due to his status of "shareholder, officer and director" of corporate signatory (internal quotations and citation omitted)); *Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp. 2d 1054, 1056-57 (D. Minn. 2008) ("[A] third party may be bound by a forum-selection clause where it is closely related to the dispute such that it becomes foreseeable that it will be bound. . . . It is true that the majority of cases binding a third party to a forum-selection clause under the closely-related-party doctrine involved third parties *suing* as plaintiffs, rather than those *being sued* as defendants. . . . But the Court does not believe that the closely-related-party doctrine is limited to third-party plaintiffs. Indeed, when deciding whether the doctrine applies, a court must answer only the following question: should the third party reasonably foresee being bound by the forum-selection clause because of its relationships to the cause of action and the signatory to the forum-selection clause?" (internal quotations and citations omitted)); *Compana LLC v. Mondial Assistance SAS*, No. 3:07-CV-1293-D, 2008 WL 190522, at *4 (N.D. Tex. Jan. 23, 2008) ("The Fifth Circuit recognizes two theories of estoppel that can bind a nonparty of a contract to the contract's arbitration or forum

selection clause. The first is called an 'intertwined claims theory' of equitable estoppel, which grants a non-signatory to a contract the right to enforce a provision of the contract against a signatory. . . . The Fifth Circuit recognizes another form of estoppel-'direct benefits estoppel'-which grants a signatory to a contract the right to enforce a contract provision against a non-signatory." (internal citations omitted)); *Aspitz v. Witness Sys., Inc.*, No. C 07-02068 RS, 2007 WL 2318004, at *3 (N.D. Cal. Aug. 10, 2007) (observing fact that party did not sign agreement is not controlling as to whether forum-selection clause would be enforced); *Affiliated Mortg. Prot., LLC v. Tareen*, Civ. A. No. 06 4908 (DRD), 2007 WL 203947, at *4 (D.N.J. Jan. 24, 2007) ("[W]here a third party's conduct is closely related to the contractual relationship, the forum selection clause applies to the third party." (internal quotations and citation omitted)); *Novak v. Tucows, Inc.*, No. 06CV1909 (JFB)(ARL), 2007 WL 922306, at *13 (E.D.N.Y. March 26, 2007) ("[A]t least two courts within this Circuit have held that [i]t is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . A non-party to an agreement may be bound by a forum selection clause where the party is closely related to the dispute such that it becomes foreseeable that it will be bound." (internal quotations and citations omitted)); *First Specialty Ins. Corp. v. Admiral Ins. Co.*, No. CV 07 408 MO, 2007 WL 1876516, at *3 (D. Or. June 22, 2007) ("[A] range of transaction participants, including non-parties, should be bound by forum selection clauses of an underlying agreement if their conduct is 'closely related to the contractual relationship.'. . . The fact that either one

or both parties was not a signatory to the underlying contract is not dispositive." (internal citations omitted)); *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2463283, at *6 (E.D. Tenn. Aug. 27, 2007) ("Other courts have enforced a contractual forum selection clause against non-signatories to the contract, so long as those parties were closely related to the dispute and it was foreseeable they might be bound." (internal quotations and citations omitted)); *Weingard v. Telepathy, Inc.*, No. 05 Civ. 2024 (MBM), 2005 WL 2990645, at *5 (S.D.N.Y. Nov. 7, 2005) ("Other Circuits have held that a contractually-based forum selection clause also covers tort claims against non-signatories if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties, . . . or if resolution of the claims relates to interpretation of the contract, or if the tort claims involve the same operative facts as a parallel claim for a breach of contract.". . . (internal quotations and citations omitted)); *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1434 (N.D. Cal. 1997) ("It is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. . . . [T]he conduct of GTSI and Mr. Fuller are closely related [to] the contractual relationship between Mr. Graham and TPI, and the forum selection clause applies to both GTSI and Mr. Fuller in spite of the fact that they are not signatories to the PSA." (internal quotations and citations omitted)); *Beck v. CIT Group/Credit Fin., Inc.*, Civ. A. No. 94-5513, 1995 WL 394067, at *6 (E.D. Pa. June 29, 1995) ("That Mr. Beck signed the Security Agreement as president of Beck Co. is of little consequence given his intimate relationship

to Beck Co., the benefit to him from the funding provided, the circumstances giving rise to his claims that he was personally injured by the manner in which defendant performed under the agreement and his request to be credited personally for amounts allegedly overcharged to Beck Co. . . . Assuming that Mrs. Beck has standing on the claims asserted, she is similarly subject to the forum selection provisions. Moreover, given the relationship of the Becks and the circumstances presented, it would be wholly inappropriate to permit Mr. Beck to evade the forum provision in his guaranty and elsewhere by initiating suit jointly with Mrs. Beck." (internal citations and footnote omitted)); *Sparks Tune-Up Ctrs., Inc. v. Strong*, No. 92 C 5902, 1994 WL 188211, at *5 (N.D. Ill. May 12, 1994) ("The binding thread in cases which hold that a non-signatory party should 'benefit from and be subject to' a forum selection clause is an overriding concern to prevent a contracting party from escaping contractual obligations which he bargained for and/or agreed upon."); *Lu v. Dryclean-U.S.A. of California, Inc.*, 11 Cal. App. 4th 1490, 1493-94, 14 Cal. Rptr. 2d 906, 908 (1992) ("[P]laintiffs argue enforcement of the forum selection clause would be unreasonable because two of the defendants, Dryclean Franchise and Dryclean U.S.A., did not sign the Agreement containing the clause. Again, we are compelled to disagree. A range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." (internal quotations and citation omitted)); *Citigroup Inc. v. Caputo*, 957 So.2d 98, 102 (Fla. Ct. App. 2007) ("Even assuming Citigroup were not covered by the Citibank Agreement, a non-signatory may invoke a signatory's forum selection clause

where the non-signatory and signatory are related."); *Deloitte & Touche v. Gencor Indus., Inc.*, 929 So. 2d 678, 684 (Fla. Dist. Ct. App. 2006) (observing that "where the interests of a non-party are directly related to or completely derivative of those of the contracting party, the non-signatory is bound by the contract's forum selection clause."); *Tuttle's Design-Build, Inc. v. Florida Fancy, Inc.*, 604 So. 2d 873, 873-74 (Fla. Dist. Ct. App. 1992) (recognizing that reasonable forum-selection clause would be enforced against non-signatory); *Brinson v. Martin*, 220 Ga. App. 638, 640, 469 S.E.2d 537, 539-40 (Ga. Ct. App. 1996) ("[Plaintiff] Brinson also contends the court erred in dismissing his claims against Martin. He argues that regardless of whether the venue clause is applicable to Woodmen, the clause would not apply to his claims against Martin for tortious interference with economic relations and unjust enrichment because those claims do not arise out of the contract and involve parties who were not signatories to the contract. . . . [D]espite Brinson's attempt to characterize his claims against Martin as falling outside the business relationship he had with Woodmen, it is clear from his complaint that the claims arose either directly or indirectly from his contract with Woodmen. Under these circumstances, we are persuaded that if Martin were not entitled to rely on the clause, separate actions would likely be brought, possibly resulting in varying decisions, inconsistent with the administration of justice. For these reasons, we conclude that the trial court did not err in ruling that Martin may rely on the forum selection clause in this case."); *Grott v. Jim Barna Log Sys.-Midwest, Inc.*, 794 N.E.2d 1098, 1104-05 (Ind. Ct. App. 2003) ("The Texas Court of Appeals has applied forum-

selection clauses to nonsignatories to a contract who are transaction participants[,] . . . mean[ing] an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum-selection clause." (internal quotations, citations, and footnotes omitted)); *Titan Indem. Co. v. Hood*, 895 So. 2d 138, 148 (Miss. 2004) (quoting approvingly comment from *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996), stating "[w]e agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract . . ."); *Dogmoch Int'l Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397, (N.Y. App. Div. 2003) ("Although defendant was a nonsignatory to the account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause given the close relationship between itself and its subsidiary. . . ."); *Kelly v. Bear, Stearns & Co. Inc.*, No. CONTROL 080832, 2001 WL 1807360, at *2 (Pa. Commw. Ct. Dec. 18, 2001) ("[P]laintiffs argue that as non-signatories to the Engagement Letters, the forum selection clause does not apply to them. This court disagrees. This dispute is governed by the forum selection clause because the claims asserted clearly arise out of the only possible relationship plaintiffs had with Bear Stearns--the Engagement Letters."); *Sevier County Bank v. Paymentech Merch. Servs.*, Inc., No. E2005-02420-COA-R3-CV, 2006 WL 2423547, at *9 (Tenn. Ct. App. Aug. 23, 2006) ("We agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract. By transaction

participant, we mean an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause. To hold otherwise would allow a nonsignatory employee, who was a transaction participant, to defeat his company's agreed-to forum by refusing to be bound by the employer's contract. This cannot be. We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract."); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. Ct. App. 1996) ("We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract." (footnote omitted)).

Based upon the foregoing, we now hold that a plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract. We further hold that a defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract.

Applying the foregoing holdings to the facts of the instant case, we first note that, as to the plaintiffs, Sovereign; Mr. Caperton, as president of Sovereign; and Harman Mining were signatories to the 1997 CSA; Harman Development and Mr. Caperton, in his individual capacity, were not.

However, Sovereign and Harman are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Under these facts, any claim brought by Mr. Caperton and Harman Development in connection with the 1997 CSA are closely related to the contract and are, therefore, subject to the forum-selection clause contained therein. As we determined in the preceding section of this opinion, the three factually-supported claims asserted in the first amended complaint[28] all flowed from the wrongful declaration of *force majeure* under the 1997 CSA, and were brought in connection with that contract. Accordingly, we find that Mr. Caperton and Harman Development are bound by the forum-selection clause of the 1997 CSA.

Turning to the Massey Defendants, we note that none of them were signatories to the 1997 CSA. However, Defendant Massey subsequently became the parent company to Wellmore, who is a signatory of the 1997 CSA, and Wellmore was Massey's subsidiary at the time it declared *force majeure*.[29]

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[28] As we noted in the preceding section of this opinion, the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the first amended complaint. Notably, though, only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Therefore, we limit our consideration to only those three claims that ultimately went to the jury.

[29] The 1997 CSA was executed in March 1997, and was made retroactively effective to January 1, 1997. Massey acquired Wellmore on July 31, 1997, when it purchased United Coal

All the other Massey Defendants are also subsidiaries of Massey. The complaint plainly alleges that Massey, along with all its subsidiaries who are defendants in this action, exercised "domination and control" over Wellmore and directed Wellmore to wrongfully declare *force majeure*. Because, as we previously determined, all of the claims in this action flow directly from the declaration of *force majeure*, and the complaint alleges that the Massey Defendants controlled Wellmore's declaration of *force majeure*, the complaint plainly demonstrates that the claims against the Massey Defendants are closely related to the contract. Therefore, we find that the Massey Defendants are entitled to enforce the forum-selection clause of the 1997 CSA.

4. Rebuttal. Because the forum-selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in this dispute, it is presumptively enforceable. Thus, the final step to our analysis is to ascertain whether the Harman Companies and Mr. Caperton have rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

In this regard, it has been recognized that

> [m]andatory choice of forum clauses will be enforced unless they are "unreasonable." *Davis Media Group*, 302 F. Supp. 2d at 466

[Footnote continued from previous page]
Corporation and United's subsidiary Wellmore. Wellmore declared *force majeure* on December 1, 1997.

> (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10, 92 S.Ct.1907). "Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996).

Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631-32 (D. Md. 2006) (footnotes omitted). Moreover,

> [a] party trying to defeat a mandatory choice of forum clause bears a "heavy burden." *See Davis Media Group v. Best Western Int'l, Inc.*, 302 F. Supp. 2d, 464, 469-70 (D. Md. 2004); *see also, e.g., Sarmiento v. BMG Entm't*, 326 F. Supp. 2d 1108, 1111 (C.D. Cal. 2003) ("[I]f the resisting party fails to come forward with anything beyond general and conclusory allegations of fraud and inconvenience, the court must uphold the agreement").

Id. at 631 n. 1. In this case, the Harman Companies and Mr. Caperton have not argued, either below or before this Court, that enforcement of the forum-selection clause of the 1997 CSA, i.e. requiring that this case be litigated in Virginia, was unreasonable or unjust at the time of the Massey Defendants'

motion to dismiss,[30] or that the clause was invalid

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[30] On rehearing, the Harman Companies and Mr. Caperton argue, in part, that it is unjust to apply the forum-selection clause to deprive them of the large jury verdict awarded below. The proper question, however, is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*. The Harman Companies and Mr. Caperton have not come forth with any facts or argument that enforcement of the forum-selection clause was unreasonable or unjust at that time. In addition, Mr. Caperton asserts that because this action has been fully litigated in West Virginia, and because a remedy may no longer be available in Virginia due to the running of the limitations period, it is unjust to enforce the forum selection clause. We reject this reasoning as it would effectively divest appellate courts of their appellate jurisdiction over a lower court's denial of a motion to dismiss based upon a forum selection clause as it relates to tort claims. First, because of the lengthy time involved in prosecuting a case to a final judgment and in pursuing the appellate process, the limitations period for filing a tort action in the proper forum is likely to have always run by the time of this Court's review, thus, there may never be a tort remedy available in the proper forum. Next, the defendants in this action are entitled to seek review of the lower court's decision on appeal. *See* Syllabus point 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W. Va. 46, 106 S.E.2d 97 (1958) ("'Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken.' Point 2, syllabus, *Lloyd v. Kyle*, 26 W. Va. 534 [1885]."). Finally, the cases cited by Mr. Caperton in support of his argument that it would be unjust to apply the forum-selection clause where the case is now likely time-barred in the contractual forum are unpersuasive. For example, Mr. Caperton cites *Ernest and Norman Hart Brothers, Inc. v. Town Contractors, Inc.* 18 Mass. App. Ct. 60, 65, 463 N.E.2d 355, 359

for such reasons as fraud or overreaching. Accordingly, the forum-selection clause should have been enforced by the circuit court, and that court's failure to grant the Massey Defendants' motion to dismiss based upon the forum-selection clause was an abuse of discretion.[31]

5. Retroactivity of the New Forum-Selection Clause. On rehearing, the Harman Companies and Mr. Caperton have argued that the new forum-selection clause principles of law developed in this case should not be applied retroactively to them.[32] They contend, among other

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(1984). Notably, however, that court's decision was not based solely on the lack of a remedy in the contractual forum state. Rather, the court concluded that the contract at issue was a contract of adhesion. More importantly, the court discussed at length the fact that forum-selection clauses had long been viewed as invalid in Massachusetts, and, at that time, there was no clear indication that Massachusetts would follow the modern view of reasonable and just forum-selection clauses being valid and enforceable. As noted above, in 1981 this Court indicated its approval of reasonable and just forum-selection clauses. *General Elec. Co. v. Keyser*, 166 W. Va. 456, 461-62 n.2, 275 S.E.2d 289, 292-93 n.2 (1981).

[31] We would be remiss if we did not acknowledge that the motivating factor for the Harman Companies and Mr. Caperton to bring the tort claims in West Virginia may have been due to the fact that Virginia has a cap on punitive damages and West Virginia does not. *See* Va. Code § 8.01-38.1 (1987) ("In no event shall the total amount awarded for punitive damages exceed $350,000.00."). Virginia also does not allow punitive damages for contract claims. *See Kamlar Corp. v. Haley*, 224 Va. 699, 705, 299 S.E.2d 514, 517 (Va. 1983).

[32] The Harman Companies briefed this issue in terms of applying the new principles prospectively.

things, that due process principles prohibit such application. We disagree.

To begin, we should make clear that, notwithstanding the due process argument made by the Harman Companies and Mr. Caperton, "[i]t is within the inherent power of a state's highest court to give a decision prospective or retrospective application without offending [federal] constitutional principles." *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). Stated another way,

> [t]he United States Constitution neither prohibits nor requires retroactive application of a judicial decision, and the question of retrospective or prospective application of a state judicial decision to civil litigation in the state courts is a matter of state law when, as here, the rule in question involves a matter of a common-law tort and is not based on federal constitutional or statutory law.

Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 112 (Colo. 1992). *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94, 113 S.Ct. 2510, 2516, 125 L.Ed.2d 74 (1993) ("Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions for near a thousand years.'" (citation omitted)); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."). In addition to there being no federal constitutional impediment to a judicial decision being applied retroactively, there is likewise no state constitutional

impediment. *See Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 347, 256 S.E.2d 879, 887 (1979) ("We do not find any provision in the West Virginia Constitution which addresses this point.").

The Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, "[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases." *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004). *See also Alaskan Vill., Inc. v. Smalley*, 720 P.2d 945, 949 (Alaska 1986) ("Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases."); *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 83 Cal. App. 4th 1403, 1422, 100 Cal.Rptr.2d 509, 525 (2000) ("[T]he general rule as to judicial opinions is that they are fully retroactive."); *Findley v. Findley*, 280 Ga. 454, 460, 629 S.E.2d 222, 228 (2006) ("[W]e shall continue to apply the general rule that a judicial decision announcing a new rule is retroactive[.]"); *Aleckson v. Village of Round Lake Park*, 176 Ill.2d 82, 86, 679 N.E.2d 1224, 1226 (1997) ("Generally, when a court issues an opinion, the decision is presumed to apply . . . retroactively[.]"); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 217 104 P.3d 483, 489 (2004) ("Therefore today we reaffirm our general rule that [w]e give retroactive effect to judicial decisions." (internal quotations and citation omitted)); *Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 658, 826 A.2d 577, 580-81 (2003) ("At common law, appellate decisions in civil cases are presumed to apply retroactively."); *Montells v. Haynes*, 133 N.J. 282, 295, 627 A.2d 654, 660 (1993) ("The final issue is whether our decision should follow the general rule of retroactive application[.]"); *Beavers v.*

Johnson Controls WorldServs., Inc., 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) ("[W]e believe there should be a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively."); *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, 579 Pa. 404, 418, 856 A.2d 43, 51 (2004) ("Our general principle is that we apply decisions involving changes of law in civil cases retroactively[.]"); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992) ("Generally, judicial decisions apply retroactively."); *State v. Styles*, 166 Vt. 615, 616, 693 A.2d 734, 735 (1997) ("We have previously adopted the common law rule that a change in law will be given effect while a case is on direct review, except in extraordinary cases. This rule applies whether the proceedings are civil or criminal."); *In re Commitment of Thiel*, 241 Wis. 2d. 439, 449, 625 N.W.2d 321, 326 (Ct. App. 2001) ("Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively.").

Although the common law rule presumes that appellate judicial decisions apply retroactively, "[t]he courts of this country long have recognized exceptions to the rule of retroactivity[.]" *Ashland Oil, Inc. v. Rose*, 177 W. Va. 20, 23, 350 S.E.2d 531, 534 (1986). The seminal case by this Court addressing the issue of an exception to retroactivity is *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

In *Bradley*, this Court was asked to decide whether or not our contributory negligence rule should be modified to allow for comparative negligence. After an exhaustive examination of the

history of the contributory negligence doctrine, *Bradley* found that modification of the doctrine was warranted. In doing so the opinion held,

> [o]ur present judicial rule of contributory negligence is therefore modified to provide that a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident. To the extent that our prior contributory negligence cases are inconsistent with this rule, they are overruled.

Bradley, 163 W. Va. at 342, 256 S.E.2d at 885.

Insofar as *Bradley* overruled prior contributory negligence case law, the opinion addressed the issue of whether or not the new comparative negligence rule would be applied retroactively to cases pending at the time of the decision. To resolve the issue of retroactivity, in the context of new law that overruled prior case law, *Bradley* looked for guidance from the United States Supreme Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled by Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).[33] After

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[33] The *Bradley* decision acknowledged a prior principle of law created by the Court that involved retroactivity, but found that prior principle was too narrow. *See* Syl. pt. 2, *Falconer v. Simmons*, 51 W. Va. 172, 41 S.E. 193 (1902) ("An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception,-that where there is a statute, and a

examining relevant language from the opinion in *Chevron*, *Bradley* fashioned the following test:

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which

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decision giving it a certain construction, and there is a contract valid under such construction, the later decision does not retroact so as to invalidate such contract.").

> have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Syl. pt. 5, *Bradley*.

The retroactivity test announced in *Bradley* has been relied upon by this Court whenever the issue of retroactivity has arisen in a civil case. However, the *Bradley* test is narrowly confined to deciding whether to retroactively apply a new principle of law that was created in a case that overruled prior precedent. The narrow constraints of *Bradley* have proved to be problematic whenever this Court has examined retroactivity in the context of a new principle of law created in a case that did not overrule prior precedent. *See, e.g., Richmond v. Levin*, 219 W. Va. 512, 517, 637 S.E.2d 610, 615 (2006) ("[T]he analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]" (internal quotations and citation omitted)); *Adkins v. Cline*, 216 W. Va. 504, 510, 607 S.E.2d 833, 839 (2004) ("The *Bradley* formula does not give specific guidance to our current situation[.]"); *Kincaid v. Mangum*, 189 W. Va. 404, 414, 432 S.E.2d 74, 84 (1993) ("[T]he plaintiffs correctly point out that the analysis established by *Bradley* is not directly on point since the question in the case before us does not involve overruling any prior authority[.]"). Because of the limitations imposed by *Bradley* on the issue of retroactivity, we believe that another test, designed to compliment *Bradley*, must be utilized whenever this Court is called upon to examine the issue of retroactively applying a new rule of law from a case that did not overrule any prior decision of this Court. In formulating such a test, we need look no further than the *Bradley* opinion itself.

The retroactivity test created in *Bradley* was fashioned from the following language that appeared in *Chevron* and was quoted in *Bradley*:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Bradley, 163 W. Va. at 347, 256 S.E.2d at 888 (quoting *Chevron*, 404 U.S. at 106-07, 92 S.Ct. at 355 (internal quotations and additional citations omitted)).[34] With the *Chevron* factors as a guide, we

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[34] The *Chevron* test was overruled in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). In *Harper*, the Supreme Court held that new federal judicial rules would no longer be open for selective retroactivity. The Supreme Court addressed the issue succinctly as follows:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling

now hold that in determining whether to extend full retroactivity to a new principle of law, established in a civil case that did not overrule any prior precedent, the following factors will be considered. First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

In the instant proceeding, we are called upon to decide whether or not the principles of law developed in this opinion, involving forum-selection clauses, should be applied retroactively to the parties. Under the test set out above, we find no impediment to

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> interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. The rule extends *Griffith's* ban against selective application of new rules. Mindful of the basic norms of constitutional adjudication that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.

Harper, 509 U.S. at 97, 113 S.Ct. at 2517 (internal quotations and citations omitted). It has been correctly noted that "although the United States Supreme Court has rejected *Chevron*, the states are free to continue employing the *Chevron* criteria in deciding questions of retroactivity of state law." *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483, 488 (Mont. 2004).

applying the new forum-selection clause principles to the parties in this case.

a. The new forum-selection clause principles were clearly foreshadowed. The Harman Companies and Mr. Caperton argue that the new forum-selection clause principles applied in this case were not foreshadowed by any prior decision of this Court. We disagree.

To begin, the Harman Companies and Mr. Caperton misunderstand the meaning of "foreshadowed," as that term is applied in the present context. Foreshadowing does not mean that "there has to be clear precedent before a holding can be considered clearly foreshadowed." *Collins v. Department of Corr.*, 167 Mich. App. 263, 267, 421 N.W.2d 657, 659 (1988). All that is required is some indication by a prior decision of this Court or a national trend that would "put persons on notice that [this Court] could resolve the issue either way[.]" *Id.* *See also Founder v. Cabinet for Human Res.*, 23 S.W.3d 221, 224 (Ky. Ct. App. 1999) (holding that prior judicial decision put plaintiff "on notice that it was possible that the filing of the complaint with the Commission would bar a separate action in circuit court. Thus, it was not error for the court to retroactively apply [a new decision]."). A case which helps illustrate the broad meaning of "foreshadowing" is *Professional Insurance Corp. v. Sutherland*, 700 So.2d 347 (Ala. 1997).

In *Sutherland*, the plaintiffs sued several defendant insurance companies in an Alabama trial court for tort and breach of contract claims. The defendants filed a motion to dismiss on the grounds that, under the terms of contractual forum-selection clauses between the parties, all causes of action had

to be filed in Florida. The trial court denied the motion to dismiss on the grounds that prior Alabama case law held that "outbound" forum-selection clauses were against public policy. The defendants appealed to the Alabama Supreme Court. That Court apparently issued an opinion that was withdrawn after a rehearing was granted. In the rehearing opinion, the Court held that it was overruling prior case law that barred "outbound" forum-selection clauses. More important to the case at hand, the Court addressed the issue of whether or not the new rule would be applied retroactively to the parties before the Court. In finding that the decision would be applied to the parties, *Sutherland* addressed the issue of foreshadowing as follows:

> The plaintiffs contend that when they were negotiating their contracts they relied upon the rule making forum selection provisions invalid in Alabama and that the rule we adopt today represents a fundamental change in the substantive law of this state. Therefore, they claim, an application of the "new" rule against them would be an unfair retroactive application. We disagree.
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> . . . .
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> We conclude that it is fair to apply the rule enforcing forum selection clauses to the parties in this case. As noted previously, while American courts traditionally disfavored outbound forum selection clauses, the overwhelming trend, following the United States Supreme Court's decision in *M/S Bremen*, *supra*, has been toward allowing enforcement of those clauses. *That*

> *nationwide trend foreshadowed our adoption today of the rule that such clauses are not per se void, providing notice that Alabama might follow suit and thereby reducing the reliance these plaintiffs could reasonably have placed upon the continued viability of the traditional rule in Alabama.*

Sutherland, 700 So. 2d at 351-52 (emphasis added).

Although the Alabama Supreme Court relied upon a nationwide trend as foreshadowing its new rule in *Sutherland*, we need not look to a national trend to find that the new forum-selection clause principles developed in this case were foreshadowed. As previously pointed out in this opinion, over twenty-five years ago in *General Electric Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), this Court indicated that forum-selection clauses were not against the public policy of this State. Specifically, we stated in *Keyser*,

> We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed. Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements[.]

Keyser, 166 W. Va. at 461 n.2, 275 S.E.2d at 291 n.2. Clearly, *Keyser* placed the parties in this action on notice that, when presented with an opportunity, this Court would "carefully" analyze all matters relevant to the forum-selection clause presented on appeal. Contrary to the arguments of the Harman

Companies and Mr. Caperton, there is no requirement that there must exist specific precedent that foreshadowed exactly how this Court would resolve new issues involving a forum-selection clause. If such a situation was the law in this State or any jurisdiction in the country, there would be very few cases decided on appeal that created new law which could be applied to the parties before the appellate court. This is not the law in the country nor in West Virginia. Consequently, we find that the new forum-selection clause principles created in this opinion were foreshadowed by *Keyser*.

b. The purpose and effect of the new rules will be enhanced by applying the rules retroactively to the parties. In other parts of this opinion we have discussed the general purpose and effect of forum-selection clauses. The new forum-selection clause principles announced in this decision simply provide parameters for the enforcement of forum-selection clauses. To deny application of those principles to the parties in this litigation would undermine the very essence of forum-selection clauses, which is to require parties and those in privity thereto to litigate claims in a forum voluntarily chosen by them.

c. No substantial inequitable results would flow from applying the new forum-selection clause principles retroactively. We have not been presented with any valid reason to show that applying the new principles would bring about a substantial inequitable result. "Indeed, limiting this decision to prospective application would produce inequitable results[.]" *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, ___, 174 P.3d 270, 274 (2008). This is true because there is no evidence in the record to show that the forum-selection clause

involved in this case was not freely bargained for by the actual signatories to the agreement. To allow one signatory to the agreement to escape its effects through prospective application of our new principles would simply be inequitable.

Accordingly, we conclude that the forum-selection clause principles of law adopted by this opinion may properly be applied to the parties to the instant proceeding.

6. The bankruptcy court's order did not have any preclusive effect on the forum selection clause issue. The final matter we must address in this area concerns Mr. Caperton's argument "that the United States Bankruptcy Court for the Western District of Virginia has rendered a final, uncontested ruling specifically finding West Virginia to be the proper forum for this Action."[35] As a result of this alleged final decision, Mr. Caperton contends that the doctrine of collateral estoppel precludes relitigation of the issue in the state court proceedings.[36]

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[35] We have previously noted that the Massey Defendants attempted to intervene in the bankruptcy proceeding filed by the Harman Companies. The purpose of this attempted intervention was "to determine whether the Caperton's (sic) and Harman Development's claims were actually assets of the bankruptcy estates and whether Hugh Caperton was attempting to deprive the bankruptcy estates of those assets improperly." *Caperton v. A.T. Massey Coal Co., Inc.*, 270 B.R. 654, 655 (S.D. W. Va. 2001).

[36] Mr. Caperton also contends that the doctrine of res judicata applies. Insofar as Mr. Caperton is only attacking the disposition of the forum selection clause issue, we need not separately address the res judicata claim. The result would be the same under an analysis of either doctrine.

To begin, we note that "[t]here is no question that the doctrines of res judicata and collateral estoppel apply to decisions rendered in Federal Bankruptcy Courts." *Jerome J. Steiker Co., Inc. v. Eccelston Props. Ltd.*, 593 N.Y.S.2d 394, 398 (1992). Further, because Mr. Caperton contends that the bankruptcy proceeding adjudicated the forum selection clause issue, "the federal rules of preclusion must be applied." *Sea Quest Int'l., Inc. v. Trident Shipworks, Inc.*, 958 So.2d 1115, 1119 (Fla. Dist. Ct. App. 2007). Under federal law, a party asserting collateral estoppel as a bar to relitigating an issue must establish

> (1) the issue to be precluded is identical to the issue already litigated, (2) the issue was actually determined in the prior proceeding, (3) the determination of the issue was an essential part of the decision in the prior proceeding, (4) the prior judgment was final and valid, and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue.

In re Coleman, 426 F.3d 719, 729 (4th Cir. 2005).[37]

We need not labor long on this issue. The second element of collateral estoppel is dispositive of the matter. In order for collateral estoppel to apply to the forum selection clause issue, the matter had to actually be determined in the bankruptcy proceeding. As we shall demonstrate below, it was not.

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[37] The elements required to prove collateral estoppel under West Virginia law are almost identical to the federal elements. *See* Syl. pt. 1, *Haba v. Big Arm Bar & Grill, Inc.*, 196 W. Va. 129, 468 S.E.2d 915 (1996).

As previously indicated in this opinion, the Massey Defendants attempted to have the instant case removed to a federal district court in the Southern District of West Virginia. In response to the removal, the Harman Companies and Mr. Caperton asked the federal district court to remand the case to state court. The federal district court issued a written opinion indicating that it would hold in abeyance any ruling about the propriety of the case being in federal court until the bankruptcy court made a ruling on the claims asserted by Massey as an intervenor. *See Caperton v. A.T. Massey Coal Co., Inc.*, 251 B.R. 322 (S.D. W. Va. 2000).[38] Subsequent to the bankruptcy court issuing an order that involved Massey's intervention claims, the federal district court issued another written order that interpreted the bankruptcy court's order regarding Massey's claims. The federal district court made the following findings:

> As set forth in its November 28, 2000 Joint Memorandum Opinion, the Bankruptcy Court attempted to respond to this Court's Memorandum Opinion and Order and determined the crucial question was whether Caperton and/or Harman Development have any independent causes of action under West Virginia law. The Bankruptcy Court then clarified what possible claims Caperton and Harman Development might have that are independent and non-derivative of the

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[38] It appears that the federal district court entertained the Massey Defendants' removal petition under its bankruptcy jurisdiction, because of the bankruptcy proceeding that was pending in Virginia.

> bankrupt estates' claims. It declined, however, to decide whether such claims have actual, legal validity under West Virginia state law. Instead, the Bankruptcy Court opined this question was better addressed by a West Virginia court, either state or federal, and abstained from deciding the questions presented by the declaratory judgment/adversary proceedings. *Integral to its decision to abstain and dismiss the adversary proceedings, the Bankruptcy Court determined the claims of all parties, and defenses thereto, can be adjudicated satisfactorily in the West Virginia action.*

Caperton v. A.T. Massey Coal Co., Inc., 270 B.R. 654, 655-56 (S.D.W. Va. 2001) (emphasis added). As a result of the federal district court's determination that the bankruptcy court abstained from deciding *any* issue involving the Massey intervention claims, the federal district court declined a motion by the Massey Defendants to transfer the case to a federal district court in Virginia. Specifically, the federal district court held that the Massey Defendants' "motion for transfer of venue to the District Court of the Western District of Virginia is DENIED as moot, leaving the Circuit Court of Boone County to decide whether transfer of venue remains for determination." *Caperton*, 270 B.R. at 656.[39]

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[39] In a footnote in Mr. Caperton's supplemental brief he attempts to suggest that the federal district court "found it appropriate for the case to ultimately proceed in West Virginia." The footnote is disingenuous in trying to suggest that the federal district court found that West Virginia had to allow the case to be fully litigated on the merits. The federal district court's order, like the bankruptcy court's order, left it up to the

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West Virginia courts to decide the merits of all claims and defenses asserted in the state court proceeding.

We should point out that the federal district court abstained from hearing any claim or defense asserted in the state court proceeding under the *mandatory* abstention provision of bankruptcy law, because the state law litigation was not a core proceeding for bankruptcy purposes. Specifically, the federal district court held,

> The Court holds [the Harman Companies' and Mr. Caperton's] claims are non-core because: 1) the claims are not specifically identified as core proceedings under 28 U.S.C. § 157(b)(2); 2) the claims existed prior to the filing of the [Harman Companies'] bankruptcy petitions; 3) the claims are based solely on state law and therefore exist independent of the provisions of Chapter 11; and 4) the parties' rights are not affected by the outcome of the bankruptcy proceedings.

Caperton, 270 B.R. at 657. It is generally recognized that res judicata and collateral estoppel "bar[] only claims that would constitute a core claim in an earlier bankruptcy action." *Cabrera v. First Nat'l Bank of Wheaton*, 753 N.E.2d 1138, 1147 (Ill. Ct. App. 2001). *See also I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1548 (11th Cir. 1986) (In "a non-core proceeding, the bankruptcy court could only issue proposed findings of fact and conclusions of law, which would be subject to de novo review by the district court, and such proposed findings would not be entitled to res judicata effect in subsequent litigation because there would have been no final judgment on the merits." (internal citations omitted)); *SMI/USA, Inc. v. Profile Tech., Inc.*, 38 S.W.3d 205, 211 (Tex. Ct. App. 2001) ("Although a bankruptcy judge may hear non-core proceedings and make proposed Findings of Fact and Conclusions of Law to the District Court, the judge may not render a final judgment on such claims. As a result, a bankruptcy court's disposition of non-core proceedings is not res

It is generally acknowledged that "the lower federal courts do not have appellate jurisdiction over the state courts and their decisions are not conclusive on state courts, even on questions of federal law." *State v. Robinson*, 82 P.3d 27, 30 (Mont. 2003). *See also Cash Distrib. Co., Inc. v. Neely*, 947 So. 2d 286, 292 n.5 (Miss. 2007) ("[S]tate supreme courts are not duty-bound to follow a federal court of appeals' interpretation of federal law."). Thus, the federal district court's interpretation of the bankruptcy court's order is not binding on this Court. Even so, we agree with the federal district court that the bankruptcy court's order did not address the merits of any issue or claim raised by Massey's attempted intervention in the bankruptcy proceeding.[40] The bankruptcy court's Joint Memorandum Opinion made the following findings:

> By this adversary proceeding, Massey seeks a determination of the respective ownership interests of Caperton and the bankruptcy estates of the Debtors in causes of action currently being pursued jointly by

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judicata as to subsequent state court proceedings regarding the same claims.").

[40] Mr. Caperton's res judicata claim would fail because the bankruptcy court did not enter a final judgment on the merits of Massey's intervention claims. *See Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992) ("Res judicata . . . will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same.").

> Caperton and the Debtors in the West Virginia Action. . . .
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> . . . Massey alleges that Caperton and Harman Development are seeking to enforce for their own benefit alleged claims which are assets solely of the bankruptcy estates of Harman Mining and Sovereign. However, in these proceedings, Massey's real object appears to be to obtain a judicial determination that under West Virginia law Caperton and Harman Development have no independent claims of their own which they can pursue against Massey for its alleged wrongful conduct. Because such a determination can be better rendered in the West Virginia Action, this Court chooses to abstain from hearing these declaratory judgment actions in favor of resolution by an appropriate West Virginia forum, whether state or federal.
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> . . . Most important to this Court's decision to abstain in these adversary proceedings is that the viability of Caperton's and Harman Development's claims is determined by West Virginia state law and not federal bankruptcy law. Accordingly, all of these issues can be addressed satisfactorily and most appropriately in the West Virginia Action.

Additionally, the bankruptcy court's Joint Order filed with the Joint Memorandum Opinion made the following conclusions of law:

> For the reasons expressed in this Court's Joint Memorandum Opinion entered contemporaneously herewith, in the event that Hugh Caperton and/or Harman Development Corporation are determined to have alleged independent, non-derivative claims pursuant to West Virginia law, those causes of action are hereby DECLARED not to be property of the bankruptcy estate of either Harman Mining Corporation or Sovereign Coal Sales, Incorporated. However, also for the reasons stated in such Joint Memorandum Opinion, this Court ABSTAINS from deciding whether any such claims are properly alleged or have legal validity. Accordingly, it is ORDERED that these adversary proceedings are DISMISSED.

Clearly it is evident that the bankruptcy court's Joint Memorandum Opinion and Joint Order did not address the merits of any claim, issue or defense involved in the state court proceeding. Further, "[b]ecause the [forum selection clause] issue . . . was neither decided on the merits nor necessary to support the bankruptcy court's judgment, we agree with [the Massey Defendants] that the doctrines of collateral estoppel and res judicata do not bar [raising the defense] in this case." *Cousatte v. Lucas*, 136 P.3d 484, 491 (Kan. Ct. App. 2006). *See also Kennedy v. First Nat'l Bank of Decatur*, 473 N.E.2d 604, 608 (Ill. App. Ct. 1985) ("[T]he doctrine of collateral estoppel does not bar the issue of whether [plaintiff] was injured individually because (1) such issue was not actually or necessarily decided in the bankruptcy proceeding, and (2) the Bankruptcy Court expressly determined that it had no

jurisdiction over such issue."); *Eicher v. Mid Am. Fin. Inv. Corp.*, 702 N.W.2d 792, 810 (Neb. 2005) ("Because [plaintiff's] claim in this case was not barred by the judgment in the prior bankruptcy action under the doctrines of either res judicata or collateral estoppel, the district court erred in granting the motion for partial summary judgment dismissing his claim.").

B. Res Judicata

Although the forum-selection clause is dispositive of this case, we further conclude that, assuming *arguendo* the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata.

In addressing this issue, we are called upon to decide the res judicata effect of the Virginia judgment on the instant West Virginia proceeding. We have previously held that "[u]nder Article IV, Section 1, of the Constitution of the United States, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this State." Syl. pt. 1, *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968). Further, "[b]y virtue of the full faith and credit clause of the Constitution of the United States, a judgment of a court of another state has the same force and effect in this State as it has in the state in which it was pronounced." Syl. pt. 3, *id.* "In order to ensure that another state's judgment is given the same force and effect it would have in that state, the general rule appears to be that '[t]he validity and effect of a judgment must be determined by reference to the laws of the state where it was rendered.'" *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 474, 513 S.E.2d 692, 701 (1998) (quoting 50 C.J.S. § 969,

at 563). Further, "the full faith and credit clause generally requires the courts of this State to give [a foreign] judgment at least the res judicata effect which it would be accorded by [the foreign] courts." *Jordache Enterprises*, 204 W. Va. at 476, 513 S.E.2d at 703. *See also Martin v. SAIF Corp.*, 167 P.3d 916, 918-19 (Mont. 2007) ("Full faith and credit generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." (internal quotations and citation omitted)).

Before discussing the specific elements that must be established in order for the preclusive effect of res judicata to apply under Virginia law, we must first address a preliminary issue. Under the laws of Virginia, "a judgment is not final for the purposes of res judicata . . . when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." *Faison v. Hudson*, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992). In the instant case, it appears that a trial court judgment in the Virginia proceeding was entered on May 7, 2001. Subsequently, on April 1, 2002, Massey filed a motion for summary judgment with the West Virginia circuit court, arguing that principles of res judicata required dismissal of the West Virginia case as a result of the judgment in the Virginia case. On June 17, 2002, the circuit court denied the motion. The circuit court was correct in denying summary judgment on res judicata grounds because, at the time Massey filed its motion and the circuit court decided the matter, the Virginia judgment was being appealed by Wellmore. As we have pointed out, under Virginia law "a judgment is not final for *res judicata* purposes if it is being appealed." *CDM Enters., Inc. v. Commonwealth / Manufactured Hous.*

Bd., 32 Va. App. 702, 709, 530 S.E.2d 441, 445 (2000) (emphasis in original).

The Virginia judgment did not become final for purposes of res judicata until September 13, 2002, when the Supreme Court of Virginia dismissed Wellmore's appeal. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 264 Va. 279, 568 S.E.2d 671 (2002) (dismissing appeal). Consequently, the issue we now confront is whether or not this Court may recognize the finality of the Virginia judgment, for purposes of addressing the res judicata issue on appeal. A case squarely addressing this issue is *Aronow v. Lacroix*, 268 Cal.Rptr. 866, 219 Cal. App. 3d 1039 (1990).

The facts of *Aronow* involved two separate lawsuits filed by different plaintiffs against the same law firm for malicious prosecution.[41] One lawsuit was filed by Dr. Ann Fitzsimmons, and the other was filed by Betty Aronow. In the case brought by Dr. Fitzsimmons, a judgment was rendered in favor of the law firm on January 27, 1981. However, as a result of an appeal, the case was not finally disposed of until June 24, 1987. The action brought by Ms. Aronow went to trial on October 5, 1982. Prior to trial the law firm raised the issue of res judicata, but the trial court found that res judicata did not apply because Dr. Fitzsimmons' case was pending an appeal and therefore had not become final. A jury ultimately returned a verdict in favor of Ms. Aronow and awarded her damages. The law firm appealed the judgment. While the case was pending on appeal, Dr. Fitzsimmons' case became final after an

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41 Both plaintiffs had been sued by the law firm in a previous action.

appellate court rendered a decision affirming the verdict in favor of the law firm. As a result of Dr. Fitzsimmons' case becoming final, the law firm raised the issue of res judicata in the appeal of Ms. Aronow's case. The appellate court in *Aronow* found that the issue could be raised on appeal:

> First, we consider the question of a final judgment on the merits. At the time the court trial of [Ms. Aronow] began, [Dr. Fitzsimmons' case] was on appeal, so there was no final judgment . . . on which [the law firm] could rely to raise a res judicata defense in the trial court. . . . However, . . . our affirmance of the judgment in [the law firm's] favor [became] final, . . . on September 28, 1987, while the present appeal was pending.
>
> Under these circumstances, [the law firm] now ha[s] a final judgment on which to base a claim of res judicata, and they can raise the issue on appeal. Although normally the res judicata effect of a prior judgment must be pleaded and proven at trial, when the judgment becomes final during the pendency of an appeal in another action, the first final judgment may be brought to the attention of the appellate court in which the appeal is pending and may there be relied on as res judicata.

Aronow, 268 Cal. Rptr. at 870, 219 Cal. App. 3d at 1046 (internal quotations, citations, and footnote omitted). The appellate Court in *Aronow* went on to analyze the case under res judicata principles and found that the doctrine applied "to preclude [Ms.] Aronow from a judgment in her favor in her own

case." *Aronow*, 268 Cal. Rptr. at 875, 219 Cal. App. 3d at 1053.

In accordance with *Aronow*, we now hold that a party may raise the defense of res judicata on appeal when the prior judgment relied upon becomes final during the pendency of his/her appeal. Although our holding on this issue permits us to exercise our inherent authority to consider Massey's res judicata argument, we believe the decisions of the Supreme Court of Virginia demonstrate that that Court would also exercise its inherent authority to address the issue under the facts presented.

The decision by the Supreme Court of Virginia in *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (1941), is instructive of how we believe that Court would respond to the issue of res judicata raised in this case. The facts of *Ward* show that James R. Ward drove his car into the rear of a tractor being driven by Henry Harper. The tractor was owned by Sidney Charlton. Mr. Ward sued Mr. Charlton, and, in a separate action, Mr. Harper sued Mr. Ward. Mr. Ward also brought a counter-claim against Mr. Harper.

In Mr. Ward's suit against Mr. Charlton, a jury returned a verdict in favor of Mr. Ward. However, the trial court set aside the verdict and granted judgment to Mr. Charlton. Mr. Ward appealed. While Mr. Ward's appeal was pending, a jury decided the case brought by Mr. Harper. In that case, the jury determined Mr. Harper was not entitled to recover from Mr. Ward, and Mr. Ward was not entitled to recover from Mr. Harper on the counter-claim.

As a result of the disposition of the Harper-Ward lawsuit, Mr. Charlton asked the Supreme Court of

Virginia to dismiss Mr. Ward's appeal on res judicata grounds. Mr. Charlton took the position "that since it has been adjudicated by a court of competent jurisdiction that Ward . . . can not recover of Harper, the original tort feasor, *a fortiori* Ward can not recover of Harper's master, Charlton, whose liability, if any, depends entirely upon the liability of Harper, under the doctrine of respondeat superior." *Ward*, 177 Va. at 106, 12 S.E.2d at 792. In response, Mr. Ward argued, among other things, that Mr. Charlton could not raise the defense of res judicata for the first time on appeal. The Supreme Court of Virginia disagreed:

> The present [appeal] presents the sole question as to whether Ward is entitled to a judgment against Charlton by reason of the alleged negligent acts of Charlton's servant, Harper. The petition for a writ of error prays that the verdict which Ward obtained against Charlton and which the trial court set aside, be restored, and that this court enter a final judgment on said verdict against Charlton. It conclusively appears from extrinsic evidence, which is not controverted, that subsequent to the closing of the record in the instant case a court of competent jurisdiction has determined that Ward is not entitled to recover the judgment which he here seeks.[42]

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42 It should be pointed out that, at the time of this case, the Supreme Court of Virginia had not adopted the rule that a judgment is not final for the purposes of res judicata when it is being appealed. This rule was first adopted in 1992, in *Faison v. Hudson*, 417 S.E.2d 302 (Va. 1992).

Must this court shut its eyes to these admitted facts and sagely proceed to consider an issue which has already been decided by a court of competent jurisdiction, and possibly enter a final judgment directly in conflict with that already rendered? We think not. In our opinion this court has the jurisdiction and it is its duty to examine this extrinsic evidence in determining whether it will proceed to hear the pending matter or dismiss it because the issue between the parties has been settled.

. . . .

It is true, as argued by the learned counsel for [Ward], that an appellate court in reviewing the record of the proceedings in the court below will not entertain the defense of res judicata if it was available and was not made below. This is so because the defense is an affirmative one and if not asserted below is deemed to have been waived. . . .

But this principle does not apply to the instant case where the defense was not available and could not have been asserted during the trial below.

. . . .

The doctrine of res judicata or estoppel by judgment is based on public policy. . . . It proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally

> determined, upon the merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. . . .
>
> The doctrine is firmly established in our jurisprudence and should be maintained where applicable. . . .
>
> Here it has been brought to our attention by undisputed evidence that since the trial below another court of competent jurisdiction has finally adjudicated that the plaintiff in error, Ward, is not entitled to a judgment against Charlton, the defendant in error. Hence, the plaintiff in error is estopped to ask this court to review the record before it and to enter in his favor a judgment. . . .

Ward, 177 Va. at 110-15, 12 S.E.2d at 793-96 (internal quotations and citations omitted) (footnote added).

Clearly, under the decision in *Ward*, the Supreme Court of Virginia would address the issue of res judicata presented in this case, even though the doctrine did not become ripe until the case was presented on appeal. Consequently, we find that, although the circuit court was correct in denying summary judgment to Massey on res judicata grounds because the Virginia judgment was pending appeal, this Court may now address the issue anew because a final judgment was rendered in the Virginia case by the time this appeal was prosecuted.

The Supreme Court of Virginia has described the doctrine of res judicata, and its purpose, as follows:

> the rationale for this judicially created doctrine [is that] it "rests upon public policy considerations which favor certainty in the

> establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties. . . . The doctrine prevents 'relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.'"

City of Virginia Beach v. Harris, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000) (quoting *Bill Greever Corp. v. Tazewell Nat'l Bank*, 256 Va. 250, 254, 504 S.E.2d 854, 856 (1998)) (additional citation omitted). *See also Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992) ("The bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." (citing *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974); *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493, 495 (1988); *Brown v. Haley*, 233 Va. 210, 215, 355 S.E.2d 563, 567 (1987); and *Worrie v. Boze*, 198 Va. 533, 537-38, 95 S.E.2d 192, 196-97 (1956), *aff'd on reh'g*, 198 Va. 891, 96 S.E.2d 799 (1957))).

With respect to the application of res judicata, the Virginia Court has been consistent in holding that

> [f]our elements must be present before *res judicata* can be asserted to bar a subsequent proceeding: "(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). *See*

also Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

Smith v. Ware, 244 Va. at 376, 421 S.E.2d at 445. *See also State Water Control Bd. v. Smithfield Foods, Inc.* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001) (same); *Balbir Brar Assoc., Inc. v. Consolidated Trading & Servs. Corp.*, 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996) (same). We will address each of these elements in turn.

1. Identity of the remedies sought. The Harman Companies argue that because the Virginia proceeding awarded damages for breach of contract, while the instant action awarded damages in tort, the remedies sought in these two actions are not the same. We disagree.

The Supreme Court of Virginia has not squarely defined what is meant by "identity of the remedies sought" for purposes of the res judicata test. *Ware*, 244 Va. at 376, 421 S.E.2d at 445. However, in the *Ware* case, the Court addressed the issue of whether there was identity of remedies, and concluded that because the earlier action sought relief in the court of law, while the latter action sought equitable relief in the court of chancery, there was no identity of remedy: "Mrs. Smith, in her motion for judgment for unlawful detainer, sought the remedy of possession and damages. . . . Mrs. Smith, in her bill of complaint, does not seek possession of the property. Rather, she seeks a commutation of her dower interest, which is a different remedy." *Ware*, 244 Va. at 376-77, 421 S.E.2d 445-46.[43] Thus, it appears

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[43] Until January 2006, Virginia continued to separately recognize actions at law and actions in chancery. However,

that the "remedy" element of res judicata refers, at least in significant part, to the distinction between legal and equitable remedies. The legal definition of the term "remedy" supports this view. *See, e.g.*, *Black's Law Dictionary* 1296 (7th ed. 1999) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief").

Our conclusion is further supported by the opinion in *Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996), wherein the Circuit Court of Virginia explained the concept in this way:

> At first brush [*Wright v. Castles*, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986),] appears to [be] a retrenchment in the scope of the doctrine of res judicata by its addition of the requirement of "identity of remedies," because if remedy were synonymous with "right of action," the implication is that the aggrieved party, confronted with a judgment for the defendant, may simply successively file actions based on different remedies or rights of action until he receives a favorable verdict. If this were true, the doctrine of Res Judicata would be substantially emasculated.

[Footnote continued from previous page]
that distinction was abolished as of January 1, 2006. *See Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 517 n.6, 643 S.E.2d 136, 145 n.6 (2007) ("As of January 1, 2006, Virginia abolished the procedural distinctions between actions at law and suits in chancery.").

Black's Law Dictionary (5th ed. 1979) defines remedy as "the rights given to a party by law or by contract which that party may exercise upon a default by the other party, or upon the commission of a wrong (a tort) by another party," so remedy in this context is actually consonant with the broader concept of "cause of action." Moreover, the Supreme Court in *Ware v. Smith*, [244 Va. 374, 421 S.E.2d 444 (1992)], noted that the causes of action were different and relied upon *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d 917, 920-21 (1974), which clearly held:

> Res judicata-bar, is the particular preclusive effect commonly meant by the use of the term "res judicata." A valid, personal judgment on the merits in favor of a defendant bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. *See* Restatement of Judgments 47, 62, 83 (1942).

Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action.

The ostensibly inconsistent rule of this case derives from the fact that Virginia still recognizes a distinction between law and equity, and this legal relic affects the court's res judicata decisions. In Ware v. Smith, supra; Brown v. Haley, 233 Va. 210, 219, 355

> S.E.2d 563 (1987) (equitable claim for easement arose from different transaction and could not be asserted in earlier ejectment action at law between the same parties); and *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (prior chancery suit for injunction does not bar later suit for monetary damages, the court was confronted by later cases being filed on a different side of the court, because of the dichotomy between law and equity[)]. . . .

1996 WL 1065553, at *10 (emphasis added). *See also Davis v. Marshall Homes, Inc.*, 265 Va. 159, 175, 576 S.E.2d 504, 512 (2003) (Kinser, J., dissenting) ("Nor was there an identity of remedies [in *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563 (1987),] because the two claims could not have been brought in one proceeding. If the Haleys had asserted what would have been a counterclaim in the ejectment action, the court could not have granted the requested relief regarding the easement in that action *since the relief was equitable in nature and the ejectment action was at law.* [*Brown*] at 218, 355 S.E.2d at 568." (emphasis added)).

With respect to the case presently before us, both the Virginia proceeding and the instant proceeding sought the legal remedy of monetary damages stemming from Wellmore's wrongful declaration of *force majeure* under the 1997 CSA. Accordingly, the identity of remedy element of Virginia's res judicata test has been met.

2. Identity of the cause of action. The Harman Companies contend that the breach of contract cause of action litigated in Virginia differs from the tort claims asserted in the instant action.

In reaching this conclusion, the Harman Companies argue that the proper standard to be applied is the "same evidence" test set out in *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003). We disagree.

To decide the proper rule to be applied in addressing this issue, we look to the Virginia law in effect at the time the complaint was filed in the Circuit Court of Boone County in October, 1998.[44] At that time, Virginia applied the transactional approach to determine whether there was identity of the cause of action for purposes of res judicata. *See Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 344 S.E.2d 903 (1986). In *Allstar*, the City of Alexandria, Virginia, had initiated a bidding process to procure a contract to tow vehicles in the City. Allstar Towing, Inc., was the only company to submit a bid, but the company was declared ineligible because Allstar "was not a registered corporation" on the bid opening date. *Id.* at 422, 344 S.E.2d at 904. Allstar's certificate of incorporation was issued by the State Corporation Commission the following day. Allstar petitioned the circuit court for an appeal of the determination of ineligibility, or in the alternative, an award of the "'reasonable profits' which it would have earned 'over the course of the prospective agreement.'" *Id.* Allstar also sought a temporary injunction to prevent the city from

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[44] We believe the Virginia Supreme Court would likewise apply the procedural rule in existence at the time the complaint was filed. *See, e.g.*, Rule 1:6 of the Rules of the Supreme Court of Virginia (making new res judicata rule applicable to "all Virginia judgments entered in civil actions *commenced* after July 1, 2006" (emphasis added)).

awarding a towing contract. The circuit court denied both the petition for appeal and the motion seeking injunctive relief. Meanwhile, the City requested and accepted bids for a towing contract a second time. Allstar again submitted a bid, but the contract was awarded to another company, Franconia Towing & Storage. Allstar then filed a second action against the city in the circuit court alleging that Franconia had failed to meet the city's specifications, which Allstar had met. Allstar sought damages "representing 'lost income that it would have received . . . had the contract been awarded to it.'" *Id.* at 423, 344 S.E.2d at 905. The circuit court ruled that, under the principles of res judicata, the second action was barred by the earlier action. Allstar appealed the case to the Supreme Court of Virginia, where that court found that the second action was not barred, as "the same cause of action was not involved in the two cases." *Id.* at 425, 344 S.E.2d at 906. The Supreme Court of Virginia found that "[i]n the first case, Allstar sought relief because the City had determined it to be a 'non-responsible' bidder," based on its lack of a certificate of incorporation; while in the second action Allstar sought relief in connection with a second invitation to bid, which it claimed was improperly awarded to a contractor who failed to meet the city's specifications. *Id.* The Allstar Court then concluded that the second action asserted by Allstar was not barred by the first because "the facts giving rise to the second cause of action were not even in existence when the first action was heard and decided on the merits on December 31, 1984." *Id.* In reaching its conclusion, the Supreme Court of Virginia adopted the transactional approach when it announced that "[f]or the purposes of res judicata, a 'cause of action' may

be defined broadly 'as an assertion of particular legal rights which have arisen out of a definable factual transaction.'" *Id.* (internal citation omitted)).[45]

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[45] Subsequently, in 2003, the Supreme Court of Virginia handed down an opinion that significantly changed how that Court defined the term "cause of action" for purposes of *res judicata*. *See Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003) (adopting the "same evidence test" by concluding that fraud claim did not bar subsequent breach of contract claim involving same deed of trust notes, and commenting that "[t]he mere fact that some evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of res judicata, mean that plaintiff only has one cause of action. Evidence of defendants' failure to satisfy the deed of trust notes does not prove that defendants made false representations of the values of the real properties intentionally and knowingly, with the intent to mislead plaintiff. Evidence of defendants' failure to satisfy the deed of trust notes does not establish plaintiff's reliance upon defendants' alleged misrepresentations."). The Harman Companies' assertion that we should apply the *Davis* case in resolving this issue is misplaced, as the *Davis* opinion had not yet been handed down at the time the Harman Companies filed their complaint in this action. Moreover, we believe that the *Davis* opinion was a temporary aberration in Virginia law that rejected the existing transactional approach and developed a new "same evidence" rule. *See Davis*, 265 Va. at 180, 576 S.E.2d at 515 (Kinser, J., dissenting) ("In truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside. Despite rejecting a transactional approach and overruling *Allstar Towing*, the majority, nevertheless, utilizes the Allstar Towing definition of the term 'cause of action,' and the majority states that its decision is supported by the holding in that case."). In 2006, the Supreme Court of Virginia adopted Rule 1:6, through which the Virginia Supreme Court rejected the *Davis* "same evidence" rule and returned to the transactional

The transactional approach has also been explained as follows:

> As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, '24 for purposes of defining "cause of action." The importance of understanding the broad concept of "cause of action" is essential to understanding the application of res judicata. One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, *if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.*" There can be no right of action until there is a cause of action." *Stone v. Ethan Alan*, 232 Va. 365, 368-369, 350 S.E.2d 629 (1986), citing *Caudill v. Wise Rambler*, 210 Va. 11, 13 168 S.E.2d 257, 259 (1969). However, as broad as the application of the doctrine of res judicata is, it applies only to rights of action which have accrued from the cause of action and could have been asserted in the proceeding upon which the plea is based. As the Supreme Court of Virginia noted in

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approach previously applied in Virginia when addressing the element of res judicata requiring identity of the cause of action. *See Virginia Imports, Ltd. v. Kirin Brewery of America, LLC*, 50 Va. App. 395, 410 n.6, 650 S.E.2d 554, 561 n.6 (2007) (observing that the transactional approach adopted by Rule 1:6 was promulgated to supersede the holding in *Davis*).

Southern. R. Co. v. Wash. & C.R. Co., 102 Va. 483, 491, 46 S.E. 784 (1904):

> [R]es judicata applies, except in special cases, *not only to points upon which the court was actually required, by the parties, to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Diamond State Iron Co. v. Rarig & Co.*, 93 Va. 603, 25 S.E. 894, and authorities cited. But it cannot be applied to a matter not adjudicated in a former action and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former or their privies, if the causes of action are not the same. (cites omitted).

Cherokee Corp., 1996 WL 1065553, at *8 (emphasis added). *See also Virginia Imports*, 50 Va. App. at 410 n.6, 650 S.E.2d at 561 n.6 ("Under settled principles, the 'effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which *properly belonged to the subject of litigation* and which the parties, by the exercise of reasonable diligence, *might have raised at the time*.' *Smith v. Holland*, 124 Va. 663, 666, 98 S.E. 676, 676 (1919) (emphasis added).").

Turning to the case at bar, although the Virginia proceeding addressed contract claims, while the instant proceeding addressed tort claims, this distinction is of no moment. Both the tort claims asserted in the case *sub judice* and the earlier contract claims asserted in the Virginia proceeding arise from the same "conduct, transaction or occurrence," namely the wrongful declaration of *force majeure* by Wellmore, which was carried out under the direction and control of the Massey Defendants. Thus, the tort claims asserted in this action arise from the same transactional facts as the Virginia proceeding and should have been asserted in that proceeding.

3. Identity of the parties. Mr. Caperton and Harman Development were not parties to the Virginia action, and neither were any of the Massey Defendants named in the instant suit. The Harman Companies argue that there is no identity of the parties as there is no privity between the Massey Defendants and Wellmore. We disagree, finding there is identity of the parties between the Virginia proceeding and the instant proceeding under the doctrine of privity.

Pursuant to Virginia law,

> [t]he doctrine of *res judicata* applies not only to the actual parties in a case but also to those in privity with them. *See City of Virginia Beach v. Harris*, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000). In other words, res judicata applies to anyone "'so identified in interest with [a party] that he represents the same legal right, precisely the same question, particular controversy, or issue.'"

Johnson, 7 Va. App. at 618, 376 S.E.2d at 788 (citation omitted).

CDM Enters., Inc. v. Commonwealth/Manufactured Housing Bd., 32 Va. App. 702, 710, 530 S.E.2d 441, 445 (2000). One Virginia court has explained the requirement for the identity of parties in this way:

> "One of the fundamental prerequisites to the application of the doctrine of *res judicata* is that there must be an identity of the parties between the present suit and prior litigation asserted as a bar. A party to the present suit, to be barred by the doctrine, must have been a party to the prior litigation, or represented by another so identified in interest that he represents the same legal right." *Dotson*, 232 Va. at 404-405, 350 S.E.2d at 644.
>
> There is no fixed definition of privity that automatically can be applied in all cases involving *res judicata* issues. While privity generally involves a party so identified in interest with another that he represents the same legal right, a determination of . . . who are privies requires a careful examination of the circumstances of each case.

Nero v. Ferris, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981).

In *Patterson v. Saunders*, the Supreme Court stated:

> It is generally held that "'privity' means a mutual or successive relationship to the same rights of property, or such an identification in

> interest of one person with another as to represent the same legal rights, and the term 'privy,' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial."
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> 194 Va. at 613, 74 S.E.2d at 208 (citation omitted).

Commonwealth ex rel. Gray v. Johnson, 7 Va. App. 614, 619, 376 S.E.2d 787, 789 (1989).

Turning to the case *sub judice*, we find that the parties to the Virginia proceeding "are so identified in interest" with the parties to the instant proceeding that they "represent the same legal right[s]." *CDM Enters., Inc.*, 32 Va. App. at 710, 530 S.E.2d at 445 (internal quotations and citations omitted). In the Virginia proceeding, Harman Mining and Sovereign sued Wellmore for breach of contract related to the wrongful declaration of *force majeure* under the 1997 CSA. It bears reiterating that all of the harm that has been claimed by Mr. Caperton and the Harman Companies in the instant action has stemmed directly from that wrongful declaration of *force majeure* under the 1997 CSA. Because the question of whether the declaration of *force majeure* was wrongful was the exact issue addressed in the Virginia proceeding, the interests of the various parties to the instant suit, which also depends upon the propriety of the declaration of *force majeure*, is directly aligned with the interests of the related corporate entities who participated in the Virginia action.

Moreover, it has been recognized that a parent company is in privity with its subsidiary. *See Mullins v. Daily New Leader*, 2001 WL 1772679, at

*2 (Va. Cir. Ct. Oct. 24, 2001) ("The Daily News Leader and Gannett Co., Inc., are in privity as Gannett is the parent company of the Daily News Leader."). Thus, Harman Development is plainly in privity with its subsidiaries, Harman Mining and Sovereign, who were parties to the Virginia action. Mr. Caperton is also in privity with Harman Mining and Sovereign to the extent that he signed the 1997 CSA in his capacity as president of Sovereign, and insofar as Harman Mining and Sovereign are wholly-owned subsidiaries of Harman Development, and Mr. Caperton is the sole owner of Harman Development. Likewise, A.T. Massey Coal Company is in privity with its subsidiary Wellmore, as are the remaining Massey Defendants, who are also subsidiaries of Massey and sister corporations to Wellmore.

4. Identity of the quality of the persons for or against whom the claim is made. As previously indicated, for purposes of res judicata, Virginia requires a determination be made of the identity of the quality of the persons for or against whom the claim was made. As explained by a Virginia trial court, "[t]he 'identity of quality' element is a requirement that the parties in conflict appear in the identical capacities or on 'the same side of the versus' in both proceedings." *Winchester Homes, Inc. v. Hoover Universal, Inc.*, LAW NO. 122509, 1994 WL 1031408, at *2 (Va. Cir. Ct. Nov. 2, 1994) (citing *Greene v. Warrenton Prod. Credit Ass'n*, 223 Va. 463, 291 S.E.2d 209 (1982)). The facts of the instant case clearly establish that this element has been met. The original plaintiffs in the Virginia suit are plaintiffs in the West Virginia proceeding, and they sued in the same capacity in both litigations. None of the Massey Defendants in the instant proceeding was a plaintiff in the Virginia proceeding.

See Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E.2d 364 (1955) (finding that prior litigation was not res judicata to subsequent litigation because plaintiff and defendant were both nonadversarial defendants in the prior litigation); *Ezrin v. Stack*, 281 F. Supp. 2d 67 (D.D.C. 2003) (applying Virginia law to find that res judicata applied where both parties were on opposite sides of the "v." in prior litigation).

5. Preclusive Effect of Res Judicata. Because the four elements of res judicata have been met in this case, as demonstrated above, we conclude that the instant action is barred.

IV.

CONCLUSION

For the reasons stated in the body of this opinion, we reverse the judgment in this case and remand for the circuit court to enter an order dismissing this case against A.T. Massey Coal Company and its subsidiaries with prejudice.

Reversed and remanded.

Chief Justice MAYNARD and Justice STARCHER, deeming themselves disqualified, did not participate in the decision of this case.

Judge COOKMAN and Judge FOX, sitting by temporary assignment.

Justice ALBRIGHT and Judge COOKMAN dissent and reserve the right to file dissenting opinions.

Acting Chief Justice BENJAMIN and Judge FOX concur and reserve the right to file concurring opinions.

ALBRIGHT, Justice, and COOKMAN, Judge, sitting by special assignment, dissenting:

This case is before the Court on rehearing granted after the five elected Justices on the Court, while disagreeing about the proper ultimate outcome of the case, unanimously agreed that defendant **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Caperton v. A.T. Massey Coal Co., Inc.*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

Nevertheless, on a vote of three for and two against, the original Court reversed the judgment of the Circuit Court of Boone County, which awarded Plaintiffs (Appellees here) over $50 million, plus interest and costs, on account of that egregious conduct. The majority explained its rejection of the lower court's judgment by saying **"we simply cannot compromise the law in order to reach a result that clearly appears to be justified."** *Id.*

After that opinion was filed, two of the elected Justices recused themselves from further consideration of the case. A motion to rehear the case was granted by this Court on the unanimous vote of the remaining three Justices and two circuit judges, Judge Cookman and Judge Fox, appointed by acting Chief Justice Benjamin. Now, the reconstituted Court has again reversed the lower court by a vote of three (Davis, J.; Benjamin, J., and Fox, J.) to two (Albright, J. and Cookman, J.)

Today's "new" opinion of the Court rests on the same indefensible legal grounds as the original opinion-supplemented by even more extended discussion of some of the points-but, strangely, omitting the clearly correct assertion in the original

majority opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id.* This time the majority stands silent regarding any disdain of Massey's conduct. Once again it bends the law to deny Plaintiffs the proper **"result that clearly appears to be justified."** *Id.*

For the record, we wholeheartedly embrace the determination of this Court in the original, now withdrawn, opinion that **"Massey's conduct warranted the type of judgment rendered [below] in this case."** *Id.* Likewise, we do not shrink from saying without reservation that this Court should now affirm the judgment against the Massey Defendants for the reasons outlined in this dissent. Moreover, the failure of the Court now to even acknowledge the justice of Plaintiffs' case below, as it had in the previous opinion, underlines the result-driven nature of the current majority opinion. *Id.*

In terms of the law, the errors of the majority opinion are not complex or difficult to explain. They are few in number.

First, under our law as it existed before the majority decision in this case, the proper inquiry regarding the enforceability of a forum selection clause in a contract was whether, with careful analysis, its enforcement was reasonable and just in the circumstances of the case. In this case it was not.

Second, under the law of Virginia as it existed at all times relevant to the case before us, res judicata applied when, under the facts of the case, all of the issues fairly arising under the facts pled, or which could have been pled, could have been proved with

the same evidence. In the case before us, several occurrences and transactions between the parties to this case, which were not involved in the original Virginia contract action, required substantial amounts of evidence which would not have been relevant in the Virginia contract action.

Finally, under West Virginia law as it existed before the majority opinion was filed in this case, the decision of a lower court on the venue questions raised by a plea of res judicata were to be reviewed under an abuse of discretion standard, evaluating the lower court's application of the law to the facts, not *de novo*, as the majority has now ruled.

The more narrow and focused legal arguments and supporting facts of the rehearing process make it all the more clear that (1) Massey's conduct was outside the bounds of human decency and respectable business practices, and (2) the law poses no barrier to upholding the Boone County jury verdict finding such behavior repugnant and deserving of redress. As opposed to simply deciding the case on the facts and law as they existed at the time the events complained of occurred, the majority kneads the facts so that they better fit the new law the majority finds necessary to create not only for West Virginia but also for Virginia. As we explain in detail below, neither res judicata principles nor the presence of a forum selection clause serve as an impediment to upholding the lower court's actions and jury verdict. Instead, the majority decision now ignores the admitted injustice done to Plaintiffs. It fashions no less than nine new points of law to achieve the result desired by the majority. To accomplish this goal, the majority:

1. Broadly endorses forum selection clauses, makes them applicable to persons not party to the contracts containing such clauses, removes any hint of the cautious, limited approval of such clauses in our jurisprudence, extends their effect to causes of action in which the related contract is but one of several factors justifying recovery, and charges those who would resist their application with the obligation of proving them unreasonable-even when the time for adducing evidence to meet that new requirement has irretrievably passed-making it impossible for Plaintiffs to defend their $50 million judgment.

2. With respect to the principle of res judicata-whether a prior suit adjudicated or could have adjudicated the issues raised in a suit filed later-the majority now makes the lower court's decisions reviewable *de novo*, that is, removing any requirement that this Court give any deference to the lower court's consideration of the proper application of the law to the facts of a particular case. In that regard, the majority opinion now opens the door to this Court systematically reviewing all such decisions of lower courts without regard to the reasonable discretion of the trial courts and their view of the applicable facts.

3. Lastly, this Court imperially found in the majority opinion that the law of Virginia on the issue of res judicata has been clearly settled from 1998 through 2002. Any fair review of the cases in Virginia and the course of development of Virginia law demonstrates beyond doubt that Virginia law in that time frame would not deprive the Circuit Court of Boone County of venue in the cause before us to hear and determine and grant the relief **"Massey's conduct warranted**. . . ." *Caperton*, 2007 WL

415960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

I. DISCUSSION OF THE FACTS

Nothing so completely highlights the errors of the majority opinion and the outright injustice of its result as a thorough review of the evidence admitted in the trial of this case. In the forty-page order denying Appellants (Defendants below) judgment as a matter of law or a new trial, that is, refusing to overturn the jury verdict in this case, the lower court found that there was sufficient evidence from which the jury could have found that the coal supply agreement containing the forum selection clause was but one factor in a far-reaching scheme by which Massey set out to ruin Harman Mining and its owner Hugh Caperton-beginning before Massey's involvement with the coal supply agreement and ending after Massey's brief ownership of a company party to that agreement.

In its order, the Circuit Court of Boone County said "[T]he weight of the evidence at trial fairly established and was clearly sufficient for the Jury" to conclude that:

> **Massey chose to acquire [United Coal Company] in order to eliminate a competitor and to gain more access to LTV [Steel Corporation], . . . [while] fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend.**

In paragraph 4 of that order, the trial court further said that the weight of the evidence at trial

fairly established and was clearly sufficient for the jury to further conclude that:[1]

[a] The Corporate Plaintiffs (collectively "Harman") formerly were in the business of mining and selling high quality metallurgical coal produced from the Harman Mine. The Defendants (collectively "Massey") are also in the business of mining and/or selling metallurgical coal. Harman and Massey were competitors.

[b] Massey desired, among other things, to gain LTV Steel Corporation ("LTV") as a new customer.

[c] For years, LTV had purchased substantial amounts of metallurgical coal from United Coal Company ("UCC"). The coal that LTV preferred and purchased from UCC was a premium blend of Harman coal and other, lesser quality coals (the "UCC/Harman blend") Coal from the Harman Mine is metallurgical coal with very favorable cooking characteristics prized by steelmakers like LTV.

[d] For many years, Harman sold all of its coal to one of UCC's subsidiaries, Wellmore Coal Corporation ("Wellmore"), which was, in turn, supplied to LTV as part of the UCC/Harman Blend. During the relevant time period, Harman had a long-term coal supply agreement with Wellmore. Harman

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[1] This opinion will now directly quote extensively from the lower court's very thorough order. It will not cite to particular pages or utilize in all cases the conventional means of indicating quotations, such as quotation marks, double indentations, and single spacing. However, the full text of the order is attached to this dissenting opinion as an appendix. We are grateful to Judge Jay Hoke of the 25th Judicial Circuit, sitting in the Circuit Court of Boone County, for his exhaustive review of the evidence.

was almost exclusively reliant on that contract. Wellmore's management had always encouraged Harman to mine and sell to it as much coal as it possibly could. Harman had been supplying Wellmore with its high quality metallurgical coal on a continuous basis for many years.

[e] For years, Massey wanted the LTV business and tried to increase sales of coals from its production sources ("Massey Mines") to LTV, but with little success. So Massey chose to acquire UCC in order to eliminate a competitor and to gain more access to LTV, but fully cognizant of Harman's long-term coal supply agreement with Wellmore and LTV's preference for the UCC/Harman blend. In a document written prior to Massey's purchase of UCC, Massey characterized the situation as follows:

> In layman's terms, the UCC metallurgical coal quality is equivalent to Massey's premium Marfork coal, but is further enhanced by having a higher inerts level and a lower sulfur content. UCC had achieved a particularly enviable supplier relationship with LTV Steel Corporation ("LTV") that has now been in place for over 10 years. Surprisingly, the LTV relationship is not secured by a long-term contract, but rather by annual purchase orders that are consistently renewed at favorable pricing levels because of LTV's high regard for the UCC coal quality.
>
> * * *
>
> UCC's decree [sic] of dependence on the Harman mining coal is obviously a sensitivity, since that source represents about 40% of the annual shipment level at

> Wellmore No. 7, and has become a fairly critical ingredient in the LTV coal blend. The term of the Harman mining purchase commitment runs through the year 2001. . . .

[f] Massey knew that there were risks associated with its acquisition. In a pre-acquisition document assessing those risks, Massey stated, "The most significant risk associated with this transaction is that the plus-10-years-old supplier relationship between LTV and UCC may not continue under Massey ownership."

[g] In that same document, however, Massey noted that it would enjoy a very favorable economic outcome if it could cause LTV to purchase coal from Massey Mines, instead of the UCC/Harman Blend, at the price LTV was paying for UCC/Harman coal.

[h] Recognizing that Harman coal was a critical ingredient in the coal blend that LTV preferred, and knowing that LTV in the past had chosen not to purchase much coal from Massey, Massey nonetheless went ahead and purchased UCC. Further, recognizing that "LTV is extremely reluctant to change a long-established, successful coal blend", Massey nonetheless went ahead and marketed coals from Massey Mines to LTV to replace the Harman blend that LTV preferred.

[i] Massey provided LTV with firm price quotes for coal mainly from Massey Mines, not Harman coal, and insisted that LTV make Massey its sole-source provider via a long-term coal contract, despite the fact that, historically, LTV preferred multiple suppliers and did not utilize multi-year, long-term coal supply contracts. The price that Massey quoted for it is [sic] coals to LTV constituted a "handsome

improvement" over the prices it had been receiving for its coals.

[j] Massey's marketing strategy resulted in a loss of the LTV business-a risk that it fully appreciated, acknowledged and understood prior to its marketing efforts and even prior to its purchase of UCC. Only after Massey's marketing efforts caused the loss of LTV's business did Massey direct Wellmore to declare *"force majeure"* against Harman, a declaration which Massey knew would put Harman out of business. Massey acknowledged Wellmore was readily able to purchase and sell the Harman coal, but instead chose to have Wellmore declare *"force majeure"* based upon a cost benefit analysis Massey performed which indicated that it would increase its profits by doing so. Furthermore, before Massey directed the declaration of *"force majeure"*, Massey concealed the fact that the LTV business was lost and Massey delayed Wellmore's termination of Harman's contract until late in the year, knowing it would be virtually impossible for Harman to find alternate buyers for its coal at that point in time. Once Wellmore suddenly stopped purchasing Harman's output, Harman had no ability to stay in business. In the meantime, Massey sold Wellmore.

[k] After Harman shut down operations, Massey took a series of steps to prevent Plaintiffs, both corporately and personally, from pursuing legal remedies arising out of Massey's misconduct. Massey's CEO threatened the Plaintiffs not to undertake legal action. Massey offered to purchase the assets of Harman at a distressed sale price. Massey then delayed and ultimately collapsed the transaction in such a manner so as to increase the Plaintiffs' financial distress. Instead, utilizing confidential information obtained from Plaintiffs for

the alleged purpose of negotiating a settlement of their disputes, Massey purchased a narrow band of coal reserves surrounding much of the Harman Mine for the purpose of making Harman unattractive to others and to decrease its value to all but Massey, and Massey planned to acquire Harman in the long run."

A. ACTIONS AGAINST PLAINTIFF CAPERTON PERSONALLY

The trial court identified, by way of example, specific actions which the jury could find were directed by Defendants against Plaintiff Caperton in his personal capacity, as follows:

> [i] Massey's conduct in "negotiating" directly with Caperton and under the February 9, 1998 letter agreement: Massey submitted a letter agreement to Mr. Caperton as President of Sovereign and Harman in which Massey and Wellmore expressly agreed to "pursue good faith negotiations toward concluding the described transactions." The transaction described in the agreement was intended to settle all issues relating to 1997 Coal Supply Agreement between the parties and permit Massey to acquire Caperton's interest in the Corporate Plaintiffs.
>
> [ii] Massey's conduct in negotiating a letter of intent with Grundy: In the letter of intent, Massey agreed to purchase the note held by Grundy. Massey entered into the letter of intent with Grundy with full knowledge of Caperton's personal guarantee on the Grundy note.
>
> [iii] Massey's conduct affecting Caperton's Terra obligations: Knowing Caperton's

personal responsibilities for reclamation obligations to Terra, Massey agreed to replace the Terra reclamation bond with a Massey bond. During negotiations, Massey internal documents reflect that Caperton's personal guarantees were discussed and, as a consideration for the transaction, the parties specifically negotiated the release of "his personal guarantee obligations." Recognizing Caperton's personal interest in the negotiations, Massey required Caperton to be a signatory to the closing documents, sought a far-reaching release from Caperton personally, and agreed to give Caperton a personal release in return.

[iv] Massey's duty to mitigate based upon knowledge of Caperton's actions taken in detrimental reliance: Massey knew through confidential information exchanged during the December 1997 and January 1998 discussions with Caperton, about Caperton's plans to shut down Harman as a result of Massey's wrongfully declaration of "*force majeure*". Massey further knew that, in reliance upon an agreement in principle reached concerning the key terms and a proposed closing date of January 31, 1998, Caperton intended to shut down Harman's operations on January 19, 1998. Massey was also aware of the impact Massey's failure to close as planned would have on Caperton personally (based on his personal guarantees, likely AVS violator listing, etc.). Unknown to Caperton, Massey made an internal decision *not* to close the transaction by the agreed-to date of January 31, 1998, but chose instead

to let Caperton move forward with his plans based upon his mistaken belief concerning the closing date.

B. ADDITIONAL FACTS

In paragraph 6 of its order, the trial court took note of Massey's assertion that it had no "intent to interfere with Harman or to purposely cause financial distress for the Plaintiffs so that Massey would benefit in the long run. . . ." The lower court simply noted that "numerous pieces of documentary evidence authored by Massey belied that testimony. . . ."

In paragraphs 9 through 11 of the order, the lower court undertook a thorough review of the evidence supporting each of three causes of action upon which the case was tried and upon which the jury rendered its verdict: tortious interference, fraudulent misrepresentation and fraudulent concealment. The lower court identified the essential elements for each cause of action and analyzed the evidence adduced with respect to each such cause of action, finding a *prima facia* case established on each count.[2] In some respects, the

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[2] The three causes of action and their essential elements are identified in the order as follows:

> 1. Tortious interference with Plaintiffs' advantageous business relationships:
>
> (a) the existence of a contractual or business relationship or expectancy;
>
> (b) an intentional act of interference by a party outside that relationship or expectancy;
>
> (c) proof that the interference caused the harm sustained; and

evidence supporting an element in one count was the same evidence supporting an element of another count, findings which we will endeavor not to repeat except where the context requires it. However, the

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[Footnote continued from previous page]

(d) damages.

See, e.g., Syllabus Point 2, *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983);

2. The tort of fraudulent misrepresentation:

(a) that the act claimed to be fraudulent was the act of the defendant or induced by him;

(b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and

(c) that he was damaged because he relied on it.

See, e.g., Syllabus Point 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927).

3. Fraudulent concealment:

(1) that the act claimed to be fraudulent was the act of the defendant or induced by him;

(b) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying on it; and

(c) that he was damaged because he relied on it."

See, e.g., Syl. Pt. 1, *Llengvel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981), citing *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927). The trial court also noted that:

> A claim of fraudulent concealment "involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998).

facts the lower court found to be supported by the evidence paint in further detail a dastardly course of action by Defendants which will now go unredressed.

In paragraph 9, the trial court found *prima facia* proof that:

> The evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with the Harman Plaintiffs' advantageous relationships with, among others, the United Mine Workers of America, with Penn Virginia Coal Company, with Terra Industries, Inc., with Grundy National Bank, and with Wellmore Coal Corporation. As for Plaintiff Caperton, the evidence was clearly sufficient for the Jury to conclude that Defendants tortiously interfered with, among others, his personal guaranty relationships with Grundy National Bank, his personal liability under the Terra reclamation bonds (and resulting listing on the Applicant Violator System, or "AVS"), and his personal relationship with United Bank. Further, the evidence was clearly sufficient for the Jury to conclude that Defendants engaged in this intentional interference for the specific purpose of financially destroying Plaintiffs, both corporately and personally.
>
> (a) For example, Massey tried to persuade LTV to buy its coals in place of Harman coal, used "*force majeure*" and other threats, and otherwise interfered with Harman's contractual relations for the purpose of placing the Plaintiffs, corporately and personally, in great financial distress in order to have Harman, not Massey, bear the cost of Massey's failed marketing strategy with LTV.
>
> (b) For example, Massey directed Wellmore to declare "*force majeure*" as a result of Massey losing

LTV's business due to Massey's failed marketing attempts.

(c) For example, after directing the declaration of "*force majeure*", the Defendants participated in settlement negotiations with Plaintiffs and with Penn Virginia Coal Company, the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress.

(d) For example, after directing the declaration of "*force majeure*", the Defendants dealt directly with Grundy National Bank pursuant to notes held by Grundy, for which Plaintiff Caperton had given his personal guaranty;

(e) For example, the Defendants obtained confidential information at their meeting with Plaintiff Caperton in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in the Harman assets, the Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help to insure that Harman would only be valuable to the Defendants;

(f) For example, the Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses and caused Plaintiff Caperton's resultant AVS listing because, after conducting cost-benefit analyses, the Defendants concluded that it was in the Defendants' financial interest to do so[.]

In its order under discussion here, the trial court next commented on the evidence from which the jury might properly find that Defendants failed to establish their defense of "business justification"

under section 767 of the *Restatement (Second) of Torts* and our case of *C.W. Development Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462, 465, 408 S.E.2d 41, 44 (1991), finding that the evidence was clearly sufficient for the jury to conclude that:

> [i] Defendants developed a plan to interfere with Plaintiffs' existing and prospective relations with Wellmore before A.T. Massey Coal Company acquired Wellmore.
>
> [ii] Massey acquired UCC with the purpose of gaining access to LTV and to have the ability to interfere with the supply of Harman to LTV.
>
> [iii] The Defendants' Chief Executive Officer (CEO), without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal Corporation ("Wellmore") threaten Plaintiffs with the declaration of "force majeure;"
>
> [iv] At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened the Corporate Plaintiffs and Mr. Caperton with long and protracted litigation in the event the Corporate Plaintiffs did not agree to give up the rights to their reserves;
>
> [v] At the November, 1997 meeting the Defendants obtained confidential information and, thereafter, on the purported promise to purchase Caperton's interest in the assets of the Corporate Plaintiffs, instead used that confidential information to acquire adjoining reserves which the Defendants' own internal documents acknowledged would help to insure that the Plaintiffs' reserves would only be valuable to the Defendants;

[vi] Massey engaged in a cost-benefit analysis to determine whether it should direct Wellmore to declare "*force majeure*";

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

[viii] After directing the declaration of "*force majeure*", the Defendants participated in settlement negotiations with Plaintiffs and the Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

[ix] The Defendants misrepresented their intention to settle any disputes between the parties through an offered purchase and sale of Harman assets, and instead delayed the transaction and then reneged on their stated intention to purchase the Harman assets by collapsing the deal after the Harman operations were shut down in anticipation of the sale;

[x] The defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded that it was in their financial interest to do so; and

> [xi] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

Returning to the evidence supporting the essential elements of the three counts, the trial court recited:

(k) That Defendants' negotiations with Plaintiff Caperton in the time period from November 1997 through March 1998 were conducted directly by Defendants' Chief Executive Office, Donald Blankenship, and not by Wellmore or any of its corporate officers;

(l) That Defendants, not Wellmore or any of its corporate officers, interfered with Plaintiff Caperton's management of the bankruptcy of the Corporate Plaintiffs by purchasing claims to obtain standing in the Bankruptcy Court and to have Caperton removed as the debtor-in-possession;

(m) That Defendants took numerous specific steps pursuant to its plan to wrongfully interfere with Plaintiffs' existing contractual relations with Wellmore before, during and after the short time that Defendant A.T. Massey Coal Company owned Wellmore.

The trial court further observed that any legitimate justification or privilege to interfere in the contractual relations of subsidiaries may be lost by wrongful conduct and further observed that the preceding recital established the evidence was sufficient to allow the jury to so conclude in this case, and then found further:

(p) That additional, substantial evidence of improper motive presented to the Jury included that, on August 1, 1997, one day after the acquisition of United Coal (the parent company of Wellmore), Wellmore's management recommended the purchase of Harman's entire production for the following year, but that Defendants' CEO, Donald Blankenship, overruled this recommendation and directed Wellmore to refuse to purchase more than the minimum tonnages because of a purported "*force majeure*", that four days later, after having enacted Blankenship's directive, Blankenship put Wellmore up for sale in September of 1997[.]

In paragraph 10 of its order, the trial court found that: "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently misrepresented material information, that Plaintiffs, both personally and corporately, justifiably relied upon Defendants' fraudulent misrepresentations, and that Plaintiffs, both personally and corporately, were damaged because of that justifiable reliance." The order specifically noted eight examples of this sufficiency, five previously cited and the following three:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] In declaring "*force majeure*", Wellmore was directed by the Defendants' senior management to claim that the supposed event of "*force majeure*" was unforeseen, when Massey was well aware of and had in

> fact foreseen the event at least seven months before it occurred;
>
> [iii] In declaring "*force majeure*", Wellmore was directed by Defendants' senior management to claim that a coke facility had shut down, when Defendants knew it had not[.]

With respect to the tort of fraudulent concealment, the trial court concluded that: "The evidence was clearly sufficient for the Jury to conclude that Defendants fraudulently concealed material information which they were under a duty to disclose, that Defendants were motivated to conceal material information and prevent the Plaintiffs, both personally and corporately, from discovering the information, and that Plaintiffs, both personally and corporately, were damaged because of Defendants' concealment." The lower court then gave thirteen examples, including these nine:

> [i] While marketing their West Virginia coals to LTV, the Defendants intentionally created the false impression to Plaintiffs that they were actually trying to sell Harman coal to LTV;
>
> [ii] During the months that the Defendants were trying to persuade LTV to buy coal blends containing exclusively Massey coals mined by the West Virginia Defendants in place of Harman coal, the Defendants concealed this fact from Plaintiffs;
>
> [iii] The Defendants concealed the fact that it made numerous firm offers to sell the Defendants' West Virginia coals to LTV, but did not make firm price offers to sell Harman coal to LTV;

[iv] The Defendants purposely omitted to disclose the fact that it lost the LTV business, which it lost not because of any "*force majeure*" but because of Defendants' marketing strategy and dealings with LTV, particularly its insistence that LTV fill all of its coal requirements through Defendants' West Virginia operations via a sole supplier, long-term contract, and through its decision not to allow LTV to purchase Harman coal, LTV's preferred choice;

[v] Rather than tell Plaintiffs of its efforts to sell the Defendants' coals and its lack of effort in selling Harman coals, the Defendants' Representatives waited until shortly before year-end, when it is nearly impossible to make new coal supply arrangements for the following year, and then directed Wellmore to declare "*force majeure*" and effectively destroy the Plaintiffs' businesses.

* * *

[vii] On December 1, 1997, at the Defendants' direction and contrary to the recommendations of its management, Wellmore declared the occurrence of a "*force majeure*" event under the Coal Supply Agreement, which reduced Wellmore's commitment to purchase coal from Plaintiffs by over 60% beginning on January 1, 1998, with full knowledge that the 60% loss would be financially devastating to Plaintiffs;

* * *

> [ix] The Defendants' declaration of "*force majeure*" was without any contractual basis as Defendants knew LTV was neither a customer of Wellmore, effective January 1, 1998, nor had the LTV Pittsburgh plant been directed to close by any governmental action, but instead was intended to place additional economic pressure upon the Plaintiffs, both corporately and personally;
>
> * * *
>
> [xi] The Defendants concealed their true intention not to settle any disputed between the parties and reneged on its stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants;
>
> * * *
>
> [xiii] The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

The lower court also found "[t]hat there was sufficient evidence to support a finding of a duty by Defendants to disclose the information concealed from Plaintiffs, both corporately and personally, including, for example, the submission of a letter agreement dated February 9, 1998, to Caperton, in both his personal and corporate capacities, agreeing to 'pursue good faith negotiations toward concluding the described transactions', and that Defendants concealed their true intention at that time not to

settle any disputes between the parties and reneged on their stated intention to purchase the Harman assets, and Defendants collapsed the deal after Plaintiffs had shut down operations in anticipation of a sale to the Defendants[.]"

Finally, the trial court reviewed the evidence supporting the award of damages for the three tort claims. Again, the evidence was in part related to the coal supply agreement, but in a much larger part was completely different from that admissible in a contract action. After noting the proper measure of damages for each of the three torts, the trial court offered the following review of the substantial evidence, by way of example, from which the jury could reach its verdict on compensatory and punitive damages:

> [i] Corporate Plaintiffs introduced testimony through a number of witnesses and introduced evidence through a number of exhibits, including the expert testimony of Alan Stagg who opined to a reasonable degree of professional certainty regarding the business plan put into place when Caperton took over the business in 1993 and who provided a valuation of the Harman coal reserves, and of Mark Gleason who opined to a reasonable degree of accounting certainty that the Corporate Plaintiffs suffered damages exceeding $29 million as a result of the destruction of their business, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Corporate Plaintiffs' damages were caused by Defendants' tortious misconduct;

[ii] That Plaintiff Caperton introduced evidence through testimony on his own behalf, through his expert Daniel Selby, who opined to a reasonable degree of accounting certainty, through the testimony of Bobby Reece, an executive at Grundy National Bank, and through the introduction of exhibits all establishing his individual injuries, including injury to his personal and professional reputation resulting in the loss of income, benefits and business opportunities, personal injury by way of lost earnings and employment opportunities by way of his listing on the AVS, and personal injury by way of Defendants' tortious interference with his personal guaranty obligations in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff Caperton's damages were caused by Defendants' tortious misconduct. Such evidence included, but was not limited to:

[iii] The Plaintiff Caperton was a business leader with whom his lenders and vendors were willing to do business before Defendants' tortious conduct;

[iv] The vendors and lenders with whom Plaintiff Caperton had previously done business now refuse to do business with him due to Defendants' tortious conduct;

[v] Due to the Defendants' tortious conduct, Plaintiff Caperton became a defendant in several lawsuits brought against him personally by the lenders and vendors with

whom he had previously enjoyed a beneficial relationship;

[vi] Due to the Defendants' tortious conduct, Plaintiff Caperton has had judgments and tax liens entered against him personally throughout the State of West Virginia;

[vii] Due to the Defendants' tortious conduct, Plaintiff Caperton's personal credit rating and creditworthiness have been destroyed;

[viii] Due to the Defendant's tortious conduct, Plaintiff Caperton was and is precluded from obtaining a mining permit and engaging in his livelihood as a result of his AVS listing;

[ix] The Plaintiff Caperton's AVS listing, according to testimony at trial by those in the mining industry, constitutes a "blackball";

[x] Due to Defendants' tortious interference, Plaintiff Caperton's personal annual income went from in excess of $1.3 million to $60,000.00;

[xi] The Defendants' invaded Plaintiff Caperton's personal privacy, including the unwarranted trespass on his personal real estate to photograph his personal residence, and due to Defendants' tortious conduct, Plaintiff Caperton has suffered mental anguish and sleepless nights.

Lastly, in paragraph 13 of its order, the lower court took note of the arguments regarding choice of law, and in its analysis noted the following:

Under either the principle of *lex loci delecti* (the law of the place where the tort occurred governs) or under the principle of "most significant relationship" test set forth in the *Restatement (Second) of Conflicts*

of Law, West Virginia law should govern because: (1) the Defendants are all citizens or residents of, or have substantial contacts, with West Virginia; (2) the Corporate Plaintiffs are either citizens or residents of, or have substantial contacts with West Virginia; (3) the Plaintiff Caperton is a citizen of West Virginia; (4) much of the correspondence and documents submitted as evidence either was sent from, or sent into, West Virginia; (5) the November, 1997, meeting in which many of Defendants' threats and misrepresentations were made occurred in West Virginia. On this issue as well it should be noted that:

(a) That Defendants' misconduct occurred in substantial part in the State of West Virginia, was for the purpose of benefiting Defendants' West Virginia operations, and substantially injured residents of the State of West Virginia;

(b) That, while the Coal Supply Agreement between Plaintiff Sovereign Coal Sales and Wellmore required Sovereign to pursue its breach of contact claims against Wellmore in the State of Virginia, the Defendant in that action (Wellmore) was a different entity than the Defendants here, that it was litigated and that jury awarded a verdict based upon a breach of contract only, and that the Virginia defendant's appeal was processed in the State of Virginia only;

(c) That, as the record to this case illustrates in great depth, the Plaintiffs alleged and proved to the jury's satisfaction that the torts occurred in the State of West Virginia[.]

II. DISCUSSION OF THE APPLICABLE LAW

It is clear from the foregoing recital that Plaintiffs' claims in the West Virginia suit related to much more than just the coal supply agreement.

Notwithstanding the fact that the improper declaration of *force majeure* gave rise to a legitimate contract action in Virginia directly related to the coal supply agreement, the entire course of dealings by Massey with Plaintiffs as revealed in the West Virginia action created additional causes of action in tort that properly could be pursued in a subsequent suit in West Virginia.

Nothing underlines this more than a fair consideration of the evidence introduced at trial of Massey's actions directed against Plaintiff Caperton in his individual capacity. He was never a party in his own right to the contract action in Virginia. The Massey actions against him personally reached far beyond the enforcement of the coal supply agreement.

Similarly, it cannot be legitimately argued that the entire course of dealings by Massey with Plaintiffs that established tortious interference by Massey with the Harman companies and Plaintiff Caperton was related to the coal supply agreement or involved facts to be properly asserted and proved in connection with the Virginia contract action on the coal supply agreement.

Moreover, while Massey's involvement in the declaration of *force majeure* under the coal supply agreement is related substantially to the tort of fraudulent misrepresentation found by the jury, it is inaccurate to say that the evidence necessary to prove that tort was in all respects the same as that necessary to show a valid contract claim in the Virginia contract action.

It is likewise clear from the trial court's recital that the coal supply agreement and the Virginia contract action were only tangentially involved in

proving the fraud case and that the evidence necessary to the proof of the fraud claim in tort was in very large part quite different from any evidence properly necessary to the contract claim.

With this startling and deeply disturbing evidence in mind, from which the West Virginia jury drew its conclusion that the Massey Defendants were liable for compensatory and punitive damage , we move on to a discussion of the reasons why the majority opinion in this case is just plain wrong and is a complete denial of justice.

A. Forum Selection Clause

The majority approached the forum selection clause issue in this appeal with the single-minded purpose of nullifying the work of the Boone County Circuit Court. In so doing, the majority unnecessarily formulated the law of this state regarding forum selection clauses in a variety of ways. The new law was created to achieve the ultimate result desired in the case before us and by so doing falls short of advancing justice in this case and no doubt in others to come.

1. Standard of Review

At the outset, the majority furthered its cause by needlessly changing this state's law governing the standard of review applied to forum selection clauses. As related in the majority opinion, Appellants attempted to enforce the forum selection clause before the lower court by motion to dismiss based on venue. The majority correctly noted that this Court employs an abuse of discretion standard when reviewing motions to dismiss based on venue. Syl. Pt. 1, *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 624 S.E.2d 815 (2005). With the ink hardly dry on the 2005 opinion announcing this standard, the

majority proclaims — without expressing any reason for trumping the rule of stare decisis — that "review of the applicability and enforceability of a forum selection clause is *de novo*." Syl. Pt. 2, *Caperton v. Massey*, ___ W.Va. ___, ___ S.E.2d ___ (No. 33350, filed April __, 2008). For some inexplicable reason, the majority has decided that the deference this Court normally affords lower court decisions regarding application of the law to the facts is suspended when the matter under consideration involves "applicability and enforceability of a forum selection clause." *Id.*

2. Prior West Virginia Law Governing Forum Selection Clauses

We are equally perplexed with the majority's position that this Court has generally approved forum selection clauses. While this Court in *General Electric Company v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), acknowledged *in a footnote*[3] that such clauses are not *per se* invalid, it was further recognized in that footnote that even though "our law on this point is skeletal, it does indicate that [forum selection] contract clauses which affect such matters as jurisdiction and the like should be carefully analyzed." *Id.* at 461-62 n.2, 275 S.E.2d at 292-93 n.2. While omitting this portion of the footnote from its quotation[4] the majority did include the paragraph noting:

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[3] The issue before the Court in *Keyser* was a choice of law clause rather than a forum selection clause.

[4] The entire test of footnote two in *Keyser* reads as follows:

> We have had occasion, however, to discuss, indirectly, forum selection clauses. Although our law on this point is skeletal, it does indicate that

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contract clauses which affect matters such as jurisdiction and the like should be carefully analyzed.

Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W.Va.Code § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that stockholders bring suit in New York, *Savage v. People's Building, Loan and Savings Association*, 45 W.Va. 275, 31 S.E. 991 (1898), later cases have sanctioned, at least implicitly, forum selection clauses. *Axelrod v. Premier Photo Service, Inc.*, 154 W.Va. 137, 173 S.E.2d 383 (1970). *Board of Education v. W. Harley Miller, Inc.*, W.Va., 221 S.E.2d 882 (1975). Both *Axelrod* and *Miller* involved contracts which contained arbitration clauses. In *Axelrod*, we gave full faith and credit to a New York Court decision which confirmed an arbitration award made pursuant to the contract terms requiring arbitration. In *Miller*, we held valid a contract provision which made arbitration a condition precedent to suit in the West Virginia courts. The writer of the *Miller* opinion noted that the common law rule preventing parties from ousting the court of jurisdiction by their agreement was "archaic". 221 S.E.2d at 885.

As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. 'Rather the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just'. *Leasewell, Ltd. v. Jake Shelton Ford Inc.*, 423 F.Supp. 1011, 1015 (S.D.W.Va.1976). *See also, Kolendo v. Jarell, Inc.*, 489 F.Supp. 983 (S.D.W.Va.1980).

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See Slip Op. at 16. By selectively quoting from *Keyser*, the majority reaches the sweeping conclusion that the law of this state favors enforcing forum selection clauses. An objective reading of the entire footnote hardly supports such a conclusion. Moreover, there are no subsequent cases in our jurisprudence suggesting a move in that direction in this area of our law. The extensions of forum selection clause law in this case to cover and govern the tort claims brought in the West Virginia suit

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> The factors to be weighed in determining the effectiveness of a forum selection clause are materially different from the factors a court will consider in determining the effectiveness of a choice of laws clause and speak to very different problems. *Leasewell*, *supra* at 1014. Choice of law clauses, however, are not automatically void either, as they too are sanctioned in commercial transactions by the West Virginia Code. W.Va.Code 46-1-105(1). Thus it appears that we should not per se invalidate a choice of law clause without analysis anymore than we should invalidate a choice of forum clause without careful scrutiny.

before us ignores the very spirit of a "reasonable and just" outcome contemplated by the Court in *Keyser*.

The majority likewise ignores the express caution in *Keyser* that forum selection clauses affecting "jurisdiction and the like" — e.g., venue — should be "carefully analyzed." 166 W.Va. at 461 n. 2, 275 S.E.2d at 292 n. 2. As a result of the majority's reliance on selective portions of a footnote, Mr. Caperton's individual right to due process and a fair and just determination of his claims has been foreclosed.[5] Mr. Caperton as an individual was not a party to the coal supply agreement (hereinafter also referred to as "CSA") and did not have standing in his individual capacity to enforce the CSA. The majority has left him without remedy or a place where one could be sought.

The long and the short of it is that the majority simply pushed right past the cautious and judicious language of *Keyser* to construct and apply sweeping new law clearly fashioned to unequivocally deprive Plaintiffs, both corporate and individual, of the relief to which they are entitled.

3. Scope of New Law Governing Forum Selection Clauses

Not only did the majority institute new law regarding forum selection clauses on doubtful precedent, it also applied the new law by consistently turning a blind eye toward the actual facts of this case. The majority continuously repeats its assertion

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[5] The parties named in the Virginia case were Harman Mining Corporation, Sovereign Coal Sales, Inc. and Wellmore Coal Corporation. *See Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002).

that the forum selection clause in the 1997 CSA is the basis for the conflicts giving rise to this lawsuit,[6] yet the majority fails to explain how Massey's conduct, conduct subsequent to Wellmore's declaration of *force majeure*, is related to the CSA.[7] Moreover, the trial court specifically found that Massey's actions were not connected with the 1997 CSA, a factual finding that is entitled to deference by this Court. As determined by the trial court, some of Massey's unsavory conduct was performed prior to Massey's acquisition of United, Wellmore's parent

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[6] Specific supporting examples found in the majority opinion include: "[T]he circuit court erred in denying a motion to dismiss . . . based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit." Slip Op. at 1; "All of the injuries alleged in connection with the three aforementioned tort claims flow directly from Wellmore's declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA." *Id.* at 32; "With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations. Without the *force majeure*, those contractual relations would have been unaffected by the actions of the Massey Defendants." *Id.* at 33; "In the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey." *Id.*; "[B]ecause none of the relevant claims asserted in the amended complaint would have existed in the absence of Wellmore's declaration of *force majeure* under the 1997 CSA, these claims are all brought in connection with the 1997 CSA and, as a consequence, are within the scope of the forum selection clause contained therein." *Id.* at 34.

[7] The majority also says that all damages incurred by the Plaintiffs resulted from Wellmore's declaration of *force majeure*.

company. It was also proven that even more of Massey's unsavory conduct was performed after Massey had sold Wellmore. Despite these proven facts, the majority says that all of Massey's conduct is somehow related to the CSA. The majority improperly substitutes its own judgment without acknowledging the relevant findings of the lower court or declaring the findings of the trial court to be clearly erroneous. The majority says that "[i]n the absence of the declaration of *force majeure*, the Harman Companies would not have been forced into bankruptcy and their prospective contractual relationships would not have been impeded by Massey." *Caperton*, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 33. Not only is this argument circular - that is, in the absence of Massey's deceitful plan, Wellmore would have never declared *force majeure* and the Harman companies would not have been impeded by Massey - but it also does not reconcile with the facts of the case. Summarizing the findings of the circuit court, the majority noted that subsequent to Wellmore's declaration of *force majeure*, Massey continued in negotiations with the Harman companies and Mr. Caperton for Massey's purchase of the Harman Mine, and the parties agreed to close the transaction on January 31, 1998. However, Massey delayed and, as the circuit court found, "ultimately collapsed the transaction in such a manner so as to increase [the Harman companies'] financial distress." In addition, Massey utilized the confidential information it had obtained from the Harman companies to take further actions, such as purchasing a narrow band of the Pittston coal reserves surrounding the Harman Mine, in order to make the Harman Mine unattractive to others and thereby decrease its value. During the negotiations

for the sale of the Harman Mine to Massey, Massey had also learned that Mr. Caperton had personally guaranteed a number of the Harman companies' obligations. **Subsequently**, *the Harman companies filed for bankruptcy*.

The majority provides no explanation whatsoever as to how these acts committed by Massey are related to Wellmore's declaration of *force majeure*, and the failure to do so is because they bear no relationship to Wellmore's declaration of *force majeure*. Using the majority's line of reasoning, had Massey not entered into "sham" negotiations with the Harman companies and Mr. Caperton for Massey's purchase of the Harman Mine, the Harman companies may not have been forced into bankruptcy. Or had Massey not purposefully collapsed the transaction, after multiple delays, the Harman companies may not have been forced into bankruptcy. Or had Massey not improperly used Mr. Caperton and the Harman companies' confidential information for Massey's personal benefit, the Harman companies may not have been forced into bankruptcy.

To say that Massey's deceitful conduct "flowed from" Wellmore's declaration of *force majeure* is utterly unjustifiable. Wellmore's declaration may have made the Harman companies more vulnerable to this attack by Massey. However, it was Massey's *subsequent actions* that were the **proximate cause** of the Harman companies destruction.

With respect to the Harman companies' claim of tortious interference with existing business relationships, the majority says

> "Count I" of the amended complaint alleges tortious interference with existing

> contractual relations, and specifically identifies existing contracts with Wellmore (the 1997 CSA), Penn Virginia (the lease of the Harman Coal reserves), and the UMWA (a labor contract). Certainly a claim of interference with the 1997 CSA itself is related to that contract. With respect to the Penn Virginia and UMWA contracts, it was Wellmore's declaration of *force majeure* that placed the Harman Companies and Mr. Caperton in the position of being unable to fulfill their contractual obligations.

Caperton, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 32-33.

Contrary to this assertion by the majority, the trial court specifically found that it was Massey's conduct subsequent to the *force majeure* declaration that affected the lease of the Harman Coal reserves and the labor contract. Had Massey not engaged in its deceptive conduct - pretending to carry on purchase negotiations in order to gain confidential information for use against the Harman companies and Mr. Caperton - who knows what the outcome may have been. Not surprisingly, that was the question presented to the Boone County jury: had Massey not engaged its deceptive actions, what position would Mr. Caperton and the Harman companies have been in? Stated another way, what injuries did Massey inflict on Mr. Caperton and the Harman companies by engaging in its deceptive actions?

Although unsupported by the evidence, the majority sweepingly states that "insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they

would require interpretation of the contract to determine whether the declaration was indeed wrongful." *Caperton*, ___ W.Va. at ___, ___ S.E.2d at ___, Slip Op. at 34 n.24. The majority inaccurately indicates that a wrongful declaration of *force majeure* is necessary to the claims presented in this case. According to the majority, had Wellmore rightfully declared *force majeure*, the Harman companies and Mr. Caperton would not have a claim against Massey. The majority's new formulation of the law now permits companies to enter into "sham" negotiations and thereby acquire confidential information, only to use that information to drive their competitors out of business.

4. Due Process

The manner in which the majority applied its newly announced four-part test for determining whether a forum selection clause should be enforced violates the due process rights of not only Mr. Caperton, but the corporate appellees as well. As the majority points out by reference to multiple pages of authority, retroactive application by courts of a newly announced law is not a *per se* violation of due process. However, when a new burden is placed on a party as part of that new law and the party charged with carrying the burden is not permitted an opportunity to go forward with evidence to meet the burden, procedural due process guarantees are violated. "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); *see also Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 101 (1993). There is absolutely no way that the corporate

appellees or Mr. Caperton could have heretofore attempted to meet the burden the new standard imposes in order to overcome the presumption of enforceability. The majority affords no opportunity after announcing the new standard for the affected parties to meet the newly established burden. Obviously, Appellees' rights to due process have been abridged.

5. Contractual Rights of Third-parties

To attain its objective in this case, the majority has also ignored one of the most basic principles of contract law, that being "the primary purpose and function of the court in interpreting a contract is to ascertain the parties' intention so as to give effect to that intention." 11 *Williston on Contracts* § 32:2 at 397 (4th ed. 1999); *see also Restatement (Second) of Contracts* § 201. Courts are obligated to interpret and give effect to the mutual intention of the parties at the time of contracting. Parties to a contract may create rights in third parties by manifesting an intention to do so within the contract or by the circumstances surrounding the making of the contract. "However, in order to be entitled to relief as a third-party beneficiary, the protection afforded must have been in the contemplation of the parties at the time of the execution of the contract." 17B C.J.S. *Contracts* § 621 (1999); *see also* W. Va. Code § 55-8-12 (1923) (Repl. Vol. 2000). It is inconceivable that any of the parties to the CSA could have or should have foreseen or expected at the time of contracting that Massey would unlawfully undertake to do irreversible harm to the Harman mining operation, and to Mr. Caperton as an individual, since he was not a party to the contract in his individual capacity. Even though the contract played a role in different facets of the case brought in

West Virginia, Appellees' tort claims against Massey embraced more than the obligations and duties arising out of the CSA or conduct undertaken pursuant to the CSA.

In syllabus point eleven, the majority announces a new rule, that "[a] defendant who is a non-signatory to a contract containing a forum-selection clause may enforce that clause when it is shown that the claims against him or her are closely related to the contract." In the first case cited by the majority in support of this rule, *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, (5th Cir. 2006), the reviewing court enforced a forum selection clause against a non-signatory to the contract on the basis that the non-signatory benefitted from *performance* of the contract. The same cannot be said for the instant case where Massey benefitted from the *destruction* of the 1997 CSA.

The trial court found that Harman Development and Wellmore had formed a strong coal supply relationship with LTV Steel — a relationship that Massey desperately wanted, and apparently would stop at nothing to get. Massey developed and executed a very risky plan to obtain LTV's business,[8]

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[8] After years of trying, unsuccessfully, to obtain LTV Steel's business, and knowing that Wellmore was one of LTV Steel's primary customers for its Pittsburgh plant, Massey decided to acquire Wellmore. Massey purchased Wellmore on July 31, 1997, despite LTV's July 19, 2007, announcement that it intended to close the Pittsburgh coke plant for EPA reasons. Massey's internal memos introduced at trial in West Virginia clearly showed that Massey realized that in doing this, there was a high risk that LTV Steel would simply end the relationship with Wellmore, which happened. In its final order, the circuit court found that "[o]nly after Massey's marketing

and when that plan failed, Massey refused to accept responsibility for it actions. Massey admits that it did a "cost-benefit" analysis and determined that it was in its best interest to declare *force majeure*. However, it does not seem the declaration was in Wellmore's best interest, as the trial court found that Wellmore sold and shipped nearly two-thirds of the coal purchased from the Harman companies to LTV Steel. The majority's casting of the Wellmore-Massey relationship as being closely connected in interest is simply not correct according to the facts. Even though Massey owned Wellmore for a brief period of time - less than eight months - Massey did not further the interests of Wellmore by destroying Wellmore's relationship with LTV Steel and then with the Harman companies.

The majority emphasizes that Mr. Caperton or the Harman companies could reasonably foresee that they would be bound by the forum selection clause. However, could Mr. Caperton or the Harman companies reasonably foresee that Massey would acquire Wellmore's parent company of United Coal for a brief eight-month period, by which Massey would be able to enforce the forum selection clause? Could Mr. Caperton or the Harman companies reasonably foresee the actions Massey took after it had sold Wellmore - which removed any type of contractual relationship whatsoever between the parties - would still fall within the forum selection clause in the 1997 CSA? Apparently the majority believes Mr. Caperton and the Harman companies

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efforts caused the loss of LTV's business did Massey direct Wellmore to declare '*force majeure*' against Harman. . . ."

should have anticipated all of the peculiarities arising in this case. Ultimately, by placing such unrealistic requirements as to foreseeability on contracting parties, the majority makes West Virginia a truly vulnerable place to do business.

Another basic tenet of contract law is that the parties approach the contracting process act with good faith and the intent to deal fairly. As summarized by one authority,

> there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . .
>
> The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.

17A Am.Jur.2d *Contracts* § 370. Initially, Harman had included in its Virginia suit a claim sounding in contract for breach of the duty of good faith and fair dealing,[9] but withdrew the claim before the trial in that case. Withdrawal of the claim is fully understandable because only Wellmore, as a party to the CSA, could be bound by the *contractual* duty of good faith and fair dealing. As the lower court herein concluded from the evidence before it, manipulation of the CSA and its forum selection clause was just one of many tools Massey used both before, during and after its ownership of Wellmore.

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[9] The majority mis-characterized this claim as a tort claim, but the corporate appellees made it clear during oral argument that no claims sounding in tort were filed in Virginia.

The aim of Massey's plan was either to directly cause the demise of the Harman corporations and the financial ruin of Mr. Caperton as an individual, or at least use the Harman coal operation and Mr. Caperton as pawns to force United to accept the lower grade Massey coal for the premium coal produced from the Harman mine. There was no indication that Wellmore was aware of Massey's plan to eliminate the Harman mining operation or could have foreseen the implementation of such a plan when it entered and renewed the CSA with the corporate appellees. Essentially, the majority, by extending the right to enforce a forum selection clause under the circumstances of this case to Massey as a non-signatory to the CSA, has created a loophole whereby a non-party to a contract may gain the benefit of enforcing a forum selection clause without having the burden of accountability for acting in good faith and dealing fairly. Massey and others like Massey can simply ride the coattails of good business citizens in order to accomplish covert, questionable and reprehensible acts. We hardly find this conducive to promoting trust in the contracting process or otherwise furthering commerce and business interests - nor does it foster trust in the judicial process.

6. Weaknesses of the Announced Forum Selection Clause Test

Even if one acknowledges the suitability - in the abstract - of the test made applicable to forum selection clauses by the majority opinion, two very serious problems are readily apparent with the application to the case sub judice of the new test announced by the majority in syllabus point six. First, as mentioned earlier, retroactive application of this test does not allow parties the opportunity to

overcome the newfound presumption of enforceability, thereby depriving the parties opposing enforcement of the clause their due process rights. Our second concern rests with the new test not giving trial courts, charged with weighing the evidence regarding forum selection clause issues, the freedom to decide that the presumption of enforceability has been rebutted purely on the circumstances as revealed in the record before them. This flexibility, placed in the hands of our capable trial court judges, would serve to eliminate unnecessary expenditure of time and resources in appropriate cases.

We fear that the readily apparent flaws in the new standards embraced by the majority as governing enforcement of forum selection clauses in this state represent only the tip of the iceberg of problems which will surface upon pragmatic application of the standards in the courtrooms of this state. All lawyers know that the law can be read and written to accommodate the needs of a situation, and that the law has to be malleable in order to address a variety of ever-evolving circumstances. Consequently, good, enduring and meaningful law must be written in such a manner as to promote the noble cause of the larger good and not merely support the agenda of a few. Unfortunately, the new law governing forum selection clause issues which the majority has designed in this case reaches unreasonable and unjust results not only for the affected parties, but also for the judge and jury who heard this case and all businesses and individuals who will be impacted by anticipated as well as unexpected results.

B. Res Judicata

Dismissal on res judicata grounds was unnecessary and again exemplifies the majority's results-driven approach to this appeal.

Because the law of Virginia controls the application of res judicata in this case, a close examination of the decisions of the Supreme Court of Virginia *governing the relevant time period*[10] is essential. This study, however, must be undertaken with the understanding that the pertinent cases were decided at a time when common law and equity pleading were not merged in Virginia.[11] Such recognition is necessary because the separation of law and equity often affected whether one or more of the four elements necessary to invoke application of the doctrine of res judicata[12] was present under the facts of a given case. For example, some remedies were only available in actions brought in the chancery side of the courts while others were only

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[10] The relevant time period would logically be when the tort claim could have been joined with the contract claim filed in Virginia. Thus the relevant period would be May 21, 1998, when the contract case was filed, until no later than when the final judgment order in Virginia was entered on May 7, 2001.

[11] Common law and equity procedure were not merged in Virginia until January 1, 2006. *See* W. Hamilton Bryson, *The Merger of Common-law and Equity Pleading in Virginia*, 41 U. Rich. L. Rev. 77 (2006).

[12] The elements necessary to justify application of the doctrine of res judicata in Virginia are: "(1) identity of remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made." *Wright v. Castles*, 349 S.E.2d 125, 128 (Va. 1986); *Mowry v. City of Virginia Beach*, 93 S.E.2d 323 (1956).

obtainable on the law side of the courts.[13] Moreover, the discussion in the cases does not always address the law-equity distinction when examining the presence or absence of the elements substantiating application of res judicata, and sometimes reasoning based on the distinction is applied in cases where the basis of the two suits is not split between common law and equity. As a result, the status of the applicable law involving res judicata in Virginia simply was not as clear as the majority opinion leads one to believe. This is particularly true in Virginia's Supreme Court cases involving the meaning of the element of "identity of cause of action." A review of these cases, all decided no later than the time that the final judgment was entered in the Virginia suit, does not support the majority's conclusion that Virginia would have applied the transactional approach to the res judicata cause of action element. Instead, such review discloses that this area of Virginia's jurisprudence was in a state of flux at the time the final judgment order was entered against Wellmore in the breach of contract suit brought in Virginia.

More than one test has been employed over the years in Virginia to determine whether the element of "identity of cause of action" has been satisfied. One approach most commonly applied involves an analysis of the evidence. The extended vitality of this approach was attested to in the 1988 case of *Flora, Flora & Montague, Inc. v. Saunders*, 367

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[13] This is not to say as the majority suggests that the law/equity distinction is the only factor considered in Virginia to determine whether the same remedy is available for res judicata purposes.

S.E.2d 493 (Va. 1988), in which it was stated that for res judicata purposes,

> [t]he principal test to determine whether claims are a part of the same cause of action is whether the same evidence will support both claims. *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987)[("The test to determine whether claims are part of a single cause of action is whether same evidence is necessary to prove each claim.")]; *Jones [v. Morris Plan Bank]*, 168 Va. [284] at 290-91, 191 SE [608] at 609-610 [(1937) [("One of the principal tests in determining whether a demand is single and entire, or whether it is several, so as to give rise to more than one cause of action, is the identity of facts necessary to maintain the action. If the same evidence will support both actions, there is but one cause of action.")]; *see also Wright v. Castles*, 232 Va. 218, 223-24, 349 S.E.2d 125, 129 (1986) [(relying on *Jones v. Morris Plan Bank* to apply the same evidence test)]; *Bates [v. Devers]*, 214 Va. [667] at 672, 202 S.E.2d [917] at 922 [(1974) (applying same evidence test)].

Saunders at 495-96. Some additional older cases in which the "same evidence test" was employed to determine whether claims were part of a single cause of action are *Kelly v. Board of Public Works*, 25 Gratt. 755, 763, 1875 WL 5640, *4 (Va. 1875) ("The two claims . . . are distinct divisible claims, depending on separate contracts, made at different times and upon different principles; and the evidence to support one is not necessary to support the other, but much of it that would be material to sustain the one would be irrelevant to the other."), *Cohen v.*

Power, 32 S.E.2d 64, 65 (Va. 1944) ("The test generally applied in the application of the doctrine of res adjudicata is to determine whether the facts essential to the maintenance of the two actions are the same. If the same facts or evidence would sustain both actions. . .subsequent action based upon the same facts [is barred]."), and *Feldman v. Rucker*, 109 S.E.2d. 379, 384 (Va. 1959) (second suit found to be a different cause of action because its outcome "was dependent upon different proof and principles of law.") Since the same evidence test did not always serve justice, other factors were also considered by the high court of Virginia when deciding the presence or absence of similarity between causes of action. In *Smith v. Ware*, 421 S.E.2d 444 (Va. 1992), the Virginia Supreme Court found that different causes of action existed because different *rights* were asserted in each suit, one based in equity and the other based in law. In another case in which one suit was filed in the chancery court and the other was filed in the law court, the examination of the cause of action element turned on whether the *purposes and issues* in both suits were the same. *Worrie v. Boze*, 95 S.E.2d 192, 197 (1956). Yet another approach used in Virginia to vary the result achieved by strict application of the same evidence rule was to look at the transaction from which the suits arose.

It was in the 1974 case of *Bates v. Devers* - a case earlier noted as applying the same evidence test - that the Virginia Supreme Court first referred in a footnote to the term "transaction" in relation to the res judicata element of cause of action. The footnote from *Bates* was elevated to the body of the discussion in *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903 (Va. 1986), in the following manner:

> For the purposes of res judicata, a 'cause of action' may be defined broadly 'as an assertion of particular legal rights which have arisen of a definable factual transaction.' *Bates v. Devers*, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 921 n.8 (1974).

Allstar at 905-06. Since the same evidence test was thereafter touted in the 1988 case of *Saunders* as the principal test in this regard, a fair reading of *Allstar* is that the result the high court of Virginia believed would serve justice could not be attained by strict application of the same evidence test. Although the two suits which were the subject of the res judicata inquiry in *Allstar* would have relied upon the same evidence, the spin the Virginia Supreme Court placed on the same evidence test in *Allstar* allowed the high court to reach the conclusion that the second suit should proceed because some of the relevant events had not occurred until after the first suit was decided. The *Allstar* court did not approach the matter before it using the transactional analysis method in order to find that the facts supported an inseparable amalgam constituting but one cause of action. Rather, the Court in *Allstar* relied upon the term "definable factual transactions" to separate the interrelated facts before it and find two identifiable causes of action. *Id.* Furthermore, there was no indication in the body of the *Allstar* opinion that prior decisions were overruled, superseded or should be read in light of the adoption of a new standard for determinations of causes of action for res judicata purposes. Thus the principal insight *Allstar* provides is that the Supreme Court of Virginia would not strictly adhere to a test for cause of action which would serve to eliminate a party's right to a full and

fair hearing on matters which had not previously been adjudicated.

Although decided outside of the relevant time period of the case sub judice, the later case of *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504 (Va. 2003), supports this reading of *Allstar* while serving as further testament that the law in this area remained unsettled in Virginia until the Supreme Court of Virginia adopted Rule 1:6 of the Rules of the Supreme Court of Virginia in 2006. The majority and dissenting opinions filed in the *Davis* case nicely summarize the differing viewpoints on the proper test to apply in this regard.

The majority simply ignores the unsettled status of this area of law in Virginia in 2001 when the Virginia suit was concluded and instead looks to what the Virginia Supreme Court eventually did to resolve the dilemma. It also ignores the Virginia high court's overarching concern with achieving justice when faced with a decision of what constituted an identity of cause of action for res judicata purposes. The only Virginia cases within the relevant time period upon which the majority squarely relies are *Allstar* and the unpublished *circuit court case* of *Cherokee Corporation v. Richardson*, 1996 WL 1065553 (Va. Cir. Ct. 1996). This reliance could have only been used to substantiate the Virginia Supreme Court's later adoption in 2006 of a transactional analysis rule.[14] It is noteworthy for due process purposes that the Supreme Court of Virginia prospectively applied the

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[14] *See* Rule 1:6, Rules of Supreme Court of Virginia, regarding res judicata claim preclusion and therein defining "cause of action" for res judicata purposes.

new rule only to those cases brought on or after the effective date of July 1, 2006. To say that the parties knew, should have or even could have known that the high court of Virginia would - some five years after the final judgment was entered in the Virginia contract case - adopt a transactional analysis approach as the sole means to define cause of action for res judicata purposes is to assume that the parties had access to a crystal ball or possessed prescient abilities.

Significantly, the majority could not have followed the precedential law of Virginia and applied the same evidence test in any form since the entire record of the Virginia proceeding was not admitted into the record of this appeal, making a comparison of evidence between the Virginia suit and the West Virginia suit impossible. This serves to further demonstrate the majority's dogged pursuit of a course which would produce the results it desired in whatever available manner.

Even if the transactional analysis test was the controlling law of Virginia in 2001, the matters raised in the West Virginia suit went beyond what the majority found to be central to the transaction: the CSA.[15] The evidence introduced in the Boone County suit proved that Massey developed its plans to undermine the Harman Mine operations and to place Mr. Caperton's individual interests in jeopardy before the first CSA was signed, that is before Massey had any ownership interest in Wellmore, and carried that effort forward long after Massey sold Wellmore. Furthermore, the purposes of the

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15 The coal supply agreement was part of the record in this appeal.

transactional analysis approach have been frustrated by the way that the majority undertook to apply it in the instant case. It is recognized in the federal courts which have adopted the transactional analysis test that "[n]o simple test exists to determine whether causes of action are identical for claim preclusion purposes, and each case must be determined separately within the conceptual framework of the doctrine." *Pittston Co. v.. U.S.*, 199 F.3d 694, 704 (4th Cir. 1999); *see also* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, 18 Fed. Prac. & Proc. Juris.2d § 4407 nn. 53-54 (2002) (citing cases finding either no definition possible or no definition desirable). It is further recognized that the utility of the transactional analysis test is that it affords flexibility in examining cases which are more complex, and has been used to justify separating claims in such circumstances even though the claims arise from a common background. As summarized by one authority commenting on how the federal courts have applied the transactional analysis test in complex cases:

> One of the most general reasons for separating claims is that a broad course of completed unlawful conduct has included a clearly separable event that gave rise to distinctive injury. Thus the victim of a long conspiracy to destroy a business was permitted to follow an action for libel with an antitrust action in which the libel was merely one piece of evidence to prove the overall conspiracy. In like fashion, a trustee in bankruptcy was permitted both to recover a judgment against the controlling stockholder for breach of fiduciary responsibilities in a specific transaction, and later to subordinate

> the stockholder's rights to the rights of other stockholders on the basis of continuing breach of its responsibilities throughout the entire period of ownership. Despite the relationship among the facts of these separate actions in origin and motivation, these decisions seem to respond well to pragmatic considerations of trial efficiency and do not pose any substantial threat to interests of repose.

Wright, Miller, Cooper, 18 Fed. Prac. & Proc. Juris.2d § 4408, 195-196 (footnotes omitted).

The majority failed to closely examine whether there were clearly separable events and distinctive injuries arising in the instant case, and did not consider the pragmatic implications of joining all claims into one trial. Regrettably, it appears the majority was more committed to the aim of reaching a desired conclusion rather than arriving at a just result - which the transactional analysis approach would clearly support under the facts presented in this case.

III. SUMMATION

Although the majority opinion made substantial additions to the opinion vacated as a result of granting the rehearing motion, the omissions from the original decision overshadow the additions. Specifically, despite the disagreements among the individual Justices in the vacated opinion, all five did agree on one point:

> **[A]t the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case.**

Caperton v. A.T. Massey Coal Co., Inc., 2007 WL 4150960, Slip Op. at 13 (No. 33350, filed November 21, 2007), *withdrawn*.

As amply demonstrated by the preceding analysis, the majority could have readily allowed the work of the Boone County Circuit Court to stand. Instead, the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions. In pursuit of its desired outcome, the majority did not apply the controlling law of Virginia and instead rigidly applied a test unknown to the parties at the time the litigation was pending in Virginia, and did so without regard to the inherent flexibility of the rule. The new test was applied in such a way as to ignore the complexities of the transaction and with gross disregard for the due process rights of the litigants. Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.[16]

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[16] Mr. Caperton raised a further issue regarding possible disqualification of Justice Benjamin. The majority did not address this issue, likely because it is the practice of this Court, as it is the practice of the United States Supreme Court and other federal courts, to leave decisions on disqualification motions for each judge to decide individually. Unfortunately, with true regret, we are unable to stand silent in the present circumstances. Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955), it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts. On the record before us, we cannot say with certainty that those cases have application here. It is now clear, especially from the last motion for disqualification filed in this case, that there are now

While it gives us no pleasure to write this dissent, we recognize a duty to do so in the name of justice. Indeed, embodied in our constitution is the clear statement that "[f]ree government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles." W. Va. Const. Art. 3, § 20. Regrettably, the majority has radically strayed from the fundamental principles of fairness and justice in maintaining its course of setting aside the Boone County decision in this case, a course to which we wholeheartedly and fervently dissent.

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genuine due process implications arising under federal law, and therefore under our law, which have not been addressed.

No. 33350 *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

Benjamin, Acting C.J., concurring:

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of West Virginia

Roscoe Pound offered the following pertinent comments as to a judge's responsibility when setting forth an opinion:

> The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953). There is an important difference between a thoughtful, well-reasoned separate opinion or order and one which is grounded in the political manipulation of legal doctrine; and in the case of ensuring a stable, predictable and fair judicial system, that difference matters. Judges who use their opinions and orders simply as sensationalistic bombast by which to

convey partisan agendas or who pander to emotion rather than legal reason do a disservice to the rule of law and to the institution they serve.

It is a testament to the strength of our justice system that judges may disagree and do so openly in separate opinions. A well-reasoned and legally sound separate opinion carries with it the opportunity for pointing out differences with the opinions of the other members of the court without undermining public confidence in the judiciary. Hon. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U.L. Rev. 1185, 1196 (1992). By furthering positive progress in the development of law, a well-honed opinion serves as an invaluable instructional tool to judges, lawyers, legal scholars, law students and even to a judge's colleagues. "[T]he effective judge . . . strives to persuade, and not to pontificate. [He] speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against . . . [his] own colleagues." *Id.* at 1186 (internal quotations omitted). A separate opinion should never "generate more heat than light," but rather should "'stand on its own footing,' . . . spell[ing] out differences without jeopardizing collegiality or public respect for and confidence in the judiciary." *Id.* at 1194, 1196 (internal quotations omitted).

If the touchstone of a judicial system's fairness is *actual* justice, which I believe it is, its legitimacy is measured in actualities, not in the manipulation of appearances or the vagaries of sensationalism.[1]

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[1] As a basic premise of this concurrence, I submit that the goal of any legitimate judicial system is actual justice. Actual justice presupposes stability and predictability in the judicial system by the measured application of the rule of law. Actual

Actual justice derives from actual impartiality in decision making and is conveyed in well-written *legal* opinions which are founded in the rule of law – not in orders, opinions or public pronouncements by judicial officers reflecting partisanship, contempt for other members of this Court, or their staff, bias toward or against the parties, or a pre-judging of the issues.[2]

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justice is not measured by whether the end-result of the case, *i.e.*, who wins and who loses, meets with the acceptance of partisan constituencies or those with vested interests in specific outcomes in given cases. Rather, it is justice firmly rooted in the rule of law. Appearance or politically-driven judging is subject to the manipulation of information and opinion via innuendo, half-truths, suggestive claims, and so on. Such judging is contrary to a judge's duty to resist public clamor and fear of criticism. W. Va. Rules of Judicial Conduct, Canon 3B(2) ("A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.").

[2] The politicization of one's judicial office is perhaps the gravest threat to the independence of the judiciary, because the use of one's judicial office for partisan purposes utterly destroys the impartiality and fairness which is necessary for actual justice. A judicial officer's public actions in ridiculing selected litigants or fellow jurists, particularly during the pendency of a case or an election, necessarily conveys to the public a fundamental bias within the Court incompatible with fairness. The notion of "political" or "appearance-driven" justice in West Virginia conveys the message that appearances and rhetoric – particularly when contrived – mean more than actualities, that the manipulation of facts is more important than the facts themselves, that cases are decided to a predetermined politically-correct result, and that ends justify means. Public confidence is directly affected by the manner in which a judge or justice accords himself or herself in public, by the collegiality which he or she shares with other judicial officers, and by the quality of his or her legal reasoning.

It is an unfortunate truth that judicial officers in West Virginia must stand for office in political elections.[3] Notwithstanding this political selection method, the public's confidence in our system of justice is necessarily undermined and the stability and predictability of the rule of law is compromised when politics cross the threshold of our Court. The most important factors therefore affecting the public's perception of actual justice in this Court necessarily are the actual decisions of this Court, and its members, over time, the professional demeanor of this Court's members, and the quality of the written opinions and orders which we produce in specific cases.[4]

By baiting emotions, I believe the Dissenting opinion adopts a distinctly "political voice" rather than a "judicial voice." With due respect to my dissenting colleagues, this case does not present a close call on the basis of the rule of law. Because the Majority decision possesses such a deep strength of legal authority, I do not believe that the Dissenting opinion in any way weakens the authority or substance of the Court's decision.

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[3] The West Virginia Constitution requires that judicial officers in West Virginia be elected by the People. *See* W. Va. Const. art. VIII, §§ 2, 5, 10 and 16. The West Virginia Legislature has, by statutory law, required such elections to be partisan. W. Va. Code § 3-5-4.

[4] *See* Charles S. Trump IV, *The Case in Favor of the Nonpartisan Election of Justices of the Supreme Court of Appeals of West Virginia*, The West Virginia Lawyer, 24 (May 2000) ("Upon the bench we hope to see jurists who will decide cases upon a dispassionate reading of the law and the reasoned application of the law to the facts before them.").

The law governing the Court's decision of this case is clear. Accordingly, the focus of this concurrence is limited to four specific topics: the proper view of the facts on appeal, the transactional approach to *res judicata*, the proper standard of review for a forum selection clause, and the issue of recusal.[5]

I.

REVIEWABLE FACTS LIMITED TO PRE-TRIAL RECORD

Turning first to the more substantive issues of the case, the Dissenting opinion launches into a lengthy, twenty-two page discussion of the evidence admitted during the trial of this matter and certain determinations made by the circuit court based upon that evidence. The dissent then uses this trial

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[5] As an aside, I pause briefly to note that the Dissenting opinion begins by quoting from the Majority opinion that was filed in this action on November 21, 2007, prior to the rehearing of this case. Notably, however, that opinion no longer has any force or effect. *See State ex rel. Moats v. Janco*, 154 W. Va. 887, 901, 180 S.E.2d 74, 83 (1971) ("As a general rule, when a rehearing is granted, the status of the case is the same as though no hearing had occurred. . . . The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal. . . . By reason of the rehearing heretofore granted[,] the Majority opinion[, the concurring,] and the dissenting opinions heretofore filed in this case are withdrawn and held for naught." (internal citations omitted)). *See also Miller v. Burley*, 155 W. Va. 681, 698, 187 S.E.2d 803, 813 (1972) (same); *Atlantic Greyhound Corp. v. Public Serv. Comm'n of W. Va.*, 132 W. Va. 650, 665, 54 S.E.2d 169, 177 (1949) ("The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal.").

evidence and associated court rulings to justify its position on how the instant case should have been resolved. I do not believe this analysis by the dissent to be legally sound. Due to the posture of the instant appeal, *i.e.*, the dispositive matters actually before this Court on appeal, this Court's review is limited. As a court of appeals, this Court simply cannot consider issues not appealed by the parties or the evidence that was admitted during trial on such non-appealed issues. Specifically, there were two dispositive issues before this Court for review: (1) the circuit court's denial of the Massey defendants' *pre-trial* motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA, and (2) the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*.

With respect to the Massey Defendants' pre-trial motion to dismiss based upon the forum-selection clause, the Majority opinion correctly limits its review to the facts that were before the circuit court at the time of its ruling on the motion. Indeed, the Majority opinion correctly observes that "the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the complaint." Maj. op. at 32. *See also* Maj. op. at 49 n.30 ("The proper question . . . is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*." (emphasis added)).[6] *Cf. Powderidge Unit Owners Ass'n v.*

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[6] The Majority opinion further points out that

Highland Props., Ltd., 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. *To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.*" (emphasis added)).

With respect to the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*, the Majority opinion correctly observes that the circuit court properly denied the Massey Defendants' original motion for summary judgment as there was no final order in the Virginia action at the time that the original summary judgment motion was made to the circuit court. However, the Majority opinion goes on clearly to explain that the summary judgment issue could be raised for the first time on appeal, and appropriately addresses the issue in the same manner that the circuit court would have had the Virginia case been final at the time the Massey

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> only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment.

Maj. Slip op. at 32.

Defendants' original summary judgment motion was made before the circuit court. Therefore, the Dissenting opinion's reliance upon facts developed during the eventual trial of this matter to support its position herein is simply wrong because those facts were not before the circuit court at the time the summary judgment motion was filed and ruled upon.

II.

TRANSACTIONAL APPROACH TO *RES JUDICATA*

In ascertaining the proper test to be applied to the element of *res judicata* requiring identity of the cause of action, the Majority properly applies the transactional test, which was in place in Virginia at the time the complaint in the action underlying this appeal was filed in the Circuit Court of Boone County: October 1998.[7] Indeed, in April 1996,

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[7] Nevertheless, I note that Virginia has a long history of applying the transactional approach, beginning as early as 1884. *See Wohlford v. Compton*, 79 Va. 333, ___, 1884 WL 5056, *4 (Va. 1884) ("When a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world. This principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit."). *See also Blackwell's Adm'r v. Bragg*, 78 Va. 529, ___, 1884 WL 5003, *5 (Va. 1884) ("'The doctrine of res judicata applies to all matters which existed at the time of giving the judgment, or rendering the decree, *and which the party had the opportunity of bringing before the court*. . . . There is no relief prayed for in this which the appellants could not have obtained in that suit, if entitled thereto. There are no material averments in the bill in this case which could not have been investigated and passed on in that, and which in effect

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were not passed on by the final decree in that case.'" (citations omitted) (emphasis added)); *McCullough v. Dashiell*, 6 S. E. 610, 612 (Va. 1888) ("[A]lthough this court may be of opinion that it is only necessary to notice certain questions as they are decisive of the case, yet all questions involved in the appeal are finally adjudicated, whether distinctly raised and passed on below and here or not. If they are involved, and might have been passed on, it is enough. . . . *The doctrine of res judicata applies to all matters which existed at the time of giving the judgment or rendering the decree, and which the party had the opportunity of bringing before the court.*" (emphasis added) (citations omitted)); *Fishburne v. Furguson*, 7 S.E. 361, 362-63 (Va. 1888) ("It is necessary, first, to consider whether this suit is concluded by the suit referred to in Franklin county; for, if the question is res adjudicata, the whole matter ends there; for, when a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world. *This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case*; and when the facts which constitute the cause of action or defense have been between the same parties submitted to the consideration of the court, and passed upon by the court, they cannot again be the proper subjects for an action or defense, unless the finding and judgment of the court are opened up or set aside by competent authority. This principle of law extends still further in quieting litigation. A party cannot relitigate matters which he might have interposed, but failed to do in a prior action between the same parties, or their privies, in reference to the same subject-matter." (emphasis added) (citations omitted)); *Beale's Adm'r v. Gordon*, 21 S.E. 667, 669 (Va. 1895) ("When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy. . . . The decree in the first cause is not only final as to the matters actually determined, but *as to every matter which the parties might have litigated, within the scope of the pleadings in the cause, and*

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which might have been decided." (emphasis added) (citations omitted)); *Brunner v. Cook*, 114 S.E. 650, 651 (Va. 1922) ("'When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive on the latter not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.'" (quoting 15 R. C. L. "Judgments," § 438, p. 962)); *Gimbert v. Norfolk S.R. Co.*, 148 S.E. 680, 689-90 (Va. 1929) (same); *Choate v. Calhoun*, 149 S.E. 470, 471 (Va. 1929) (same); *Kemp v. Miller*, 186 S.E. 99, 103 (Va. 1936) (same); *Jones v. Morris Plan Bank of Portsmouth*, 191 S.E. 608, 610 (Va. 1937) ("The well established rule forbidding the splitting of causes of action is clearly stated in 1 Am. Jur., 'Actions,' § 96. It is there said: 'One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible, subject, however, to the power of the court to order consolidation. On the other hand, one who has a claim against another may take a part in the satisfaction of the whole, or maintain an action for a part only, of the claim, although there is some authority to the effect that a part of a demand cannot be waived for the purpose of giving an inferior court jurisdiction. But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the

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second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice, namely, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits.'"); *Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising from the same transaction is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (quoting American and English Encyclopedia of Law, Second Edition, volume 24, page 779)); *Royall v. Peters*, 21 S.E.2d 782, 787 (Va. 1942) ("There must at some time be an end to controversies. Courts are for the purpose of furnishing a speedy end to litigation and not as a forum for endless contentions. Carelessness or after-thought on the part of litigants ought not to be allowed to affect the conclusiveness of a proceeding which has been determined after ample opportunity for a hearing of every question which might have been litigated."); *Griffin v. Griffin*, 32 S.E.2d 700, 703 (Va. 1945) ("The appellant not only had the opportunity of bringing this ground for divorce between the court in the first suit but she had the opportunity, and *it was her duty to bring before the court in the first suit any other ground for divorce that existed at that time.* There was a final decree in the first cause rendered by a court of competent jurisdiction on the merits. It necessarily bars the appellant from conducting a subsequent suit involving the same cause of action."); *Shepherd v. Richmond Eng'g Co.*, 36 S.E.2d 531, 534-35 (Va. 1946) ("The law does not permit the owner of a single or entire cause of action or entire indivisible demand, without the consent of the person against whom the cause or demand exists, to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle

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not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. . . . That appellee must stand or fall by its election of remedies is fundamental."); *Eason v. Eason*, 131 S.E.2d 280, 282 (Va. 1963) ("When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . . ." (quotations and citation omitted)); *Hagen v. Hagen*, 139 S.E.2d 821, 823 (Va. 1965) (same); *Bates v. Devers*, 202 S.E.2d 917, 920-21 & n.8 (Va. 1974) ("A valid, personal judgment on the merits in favor of defendant bars relitigation of the same cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (citing Restatement of Judgments §§ 47, 62 & 83 (1942)); and "A 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a definable factual transaction*." (emphasis added)); *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903, 905 (Va. 1986) ("When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . . ." (quotations and citation omitted)); *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495 (Va. 1988) ("A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or

relatively close in time to the period pertinent to this action, the Supreme Court of Virginia applied the transactional approach to the issue of *res judicata* in the case of *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B and C*, 468 S.E.2d 894, 904 (Va. 1996), wherein the Supreme Court of Virginia observed that "even though the first demand described only specific defects, the doctrine of res judicata applies to *all claims which could have been brought*, thereby preventing a party from splitting his cause of action." (Emphasis added). Furthermore, Virginia courts have recognized that, both traditionally and during

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any part thereof which could have been litigated, between the same parties and their privies. . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case." (quotations and citations omitted)); *Waterfront Marine Constr., Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B & C*, 468 S.E.2d 894, 904 (Va. 1996) ("[E]ven though the first demand described only specific defects, the doctrine of res judicata applies to all claims which could have been brought, thereby preventing a party from splitting his cause of action.").

the period of time relevant to this case, Virginia has applied the transactional approach.

> The Virginia Supreme Court applies the . . . transactional analysis in considering the scope of a transaction for the application of res judicata . . . . In *Trout v. Commonwealth Transp. Commissioner*, 241 Va. 69, 73, 400 S.E.2d 172 (1991), the Supreme Court discussed this broad transactional concept:
>
> > An "action" and a "cause of action" are quite different. "Action" is defined by Code § 8.01-2, as noted above.[8] We defined "cause of action" in *Roller v. Basic Construction Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989), as "a set of operative facts which under the substantive law, may give rise to a right of action."
>
> Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, § 24 for purposes of defining "cause of action." One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.

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[8] Pursuant to Va. Code Ann. § 8.01-2, "'Action' and 'suit' may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts."

Lake Holiday Country Club, Inc. v. Teets, Nos. 00-44, 00-46, 00-47, & 00-70, 2001 WL 34037926, at *7 (Va. Cir. Ct. 2001). *See also Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996) ("As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, §24 for purposes of defining 'cause of action.'"); *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504, 515 (Va. 2003) (Kinser, J., dissenting) (observing, in case which post-dated the present action, that majority opinion overruled transactional approach that previously applied, commenting "[i]n truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside.").

The dissent argues that the transactional approach was not so clearly established in Virginia; however, the dissent points to no case that would apply to the instant action and require application of a rule other than the transactional approach. Furthermore, the dissent contains notable error. For example, the dissent represents that the case of *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1988), applied the best evidence test. To the contrary, *Saunders* actually set out the transactional approach as the appropriate test:

> A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. . . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being

> a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case.

Saunders, 367 S.E.2d at 495 (quotations and citations omitted).

The dissent also incorrectly implies that *Bates v. Devers*, 202 S.E.2d 917 (Va. 1974), utilized the same evidence test. *Bates*, in fact, applied the transactional approach as demonstrated by that Court's finding that "[a] valid, personal judgment on the merits in favor of defendant bars relitigation of the Same [sic] cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (Citing Restatement of Judgments §§ 47, 62, 83 (1942)). 202 S.E.2d at 920-21. In a footnote, the *Bates* Court went on to state that "[a] 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a*

definable factual transaction." 202 S.E.2d at 921 n.8 (emphasis added).[9]

As the Majority opinion correctly notes, the Boone County action is barred by *res judicata* under the transactional approach that is applied pursuant to Virginia law, because the claims asserted in the instant action arise from the same operative set of facts involved in the earlier Virginia action.

III.

DE NOVO REVIEW OF FORUM-SELECTION CLAUSES[10]

The Dissenting opinion also finds fault with the *de novo* standard of review set out by the Majority opinion. Again, the Dissenting opinion is incorrect.

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[9] The dissent is also erroneous in its assertion that "[i]t was in the 1974 case of *Bates v. Devers* . . . that the Virginia Supreme Court first referred in a footnote to the term 'transaction' in relation to the res judicata element of cause of action." Dissent. op. (Albright, J.) at 50. Instead, the Virginia Supreme Court utilized the term "transaction" in this manner as early as 1941. *See Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising from *the same transaction* is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (emphasis added) (quoting, American and English Encyclopedia of Law, Second Edition, volume 24, page 779)).

[10] In addition to criticizing the standard of review applied to forum-selection clauses, the Dissenting opinion takes issue with various other aspects of the forum-selection clause analysis of the Majority opinion. Though I choose to clarify this particular point, the Dissenting opinion's analyses of other issues appear to be more result-driven than legally meritorious, and will therefore not be discussed herein.

To the extent that a determination of the applicability of a forum-selection clause may require this Court to review factual determinations made by a circuit court, our review of those specific determinations is under the "clearly erroneous standard." Syl. pt. 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("[W]e review the circuit court's underlying factual findings under a clearly erroneous standard."). Nevertheless, this Court often applies multi-faceted standards of review. Thus, while certain elements of an analysis, should they exist, might require deferential scrutiny, our overarching review of the general "applicability and enforceability" of a forum-selection clause is *de novo*. Syl. pt. 2, Maj. op.; *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*. In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff. Contract interpretation as a question of law is also reviewed *de novo* on appeal." (internal citations omitted)); *Cowatch v. Sym-Tech Inc.*, No. 07-2582, 2007 WL 3257238, at *1 (3d Cir. 2007) ("Our review of the District Court's construction of the forum selection clause is plenary." (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216 (3d Cir. 1991))); *Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir. 2007) ("The district court's order granting Adagen's Rule 12(b) (3) motion for improper venue based on the contractual forum-selection clause is subject to de novo review." (citation omitted)); *Calix-Chacon v. Global Intl*

Marine, Inc., 493 F.3d 507, 510 (5th Cir. 2007) ("[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law de novo." (quoting *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002))); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) ("We also note that 'the enforceability of a forum selection clause is a question of law that we review de novo.'" (quoting *Baker v. LeBoeuf Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir. 1997))); *American Soda, LLP v. US. Filter Wastewater Group, Inc.*, 428 F.3d 921, 925 (10th Cir. 2005) ("We review the enforceability of a forum selection clause de novo." (citing *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir. 2002))); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (1st Cir. 2001) ("We review a district court's dismissal based on a forum-selection clause de novo."); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997) ("In the case at hand, neither party challenges the validity of the forum selection clause; rather, they contest the specific meaning of the language used in the forum selection clause. . . . [W]e conclude that de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause. . ."). In the instant case, the forum-selection clause was reviewed in the context of a motion to dismiss. In this context, there simply were no factual determinations made by the circuit court that required deferential review. Thus, the Majority's *de novo* review of the circuit court's forum-selection clause ruling is proper.

IV.

DISQUALIFICATION AND DUE PROCESS

In footnote 16 of the Dissenting opinion, reference is made to the motions filed by the Appellees seeking my disqualification from this case – especially the last such motion filed by Appellees.[11] Specifically, the Dissenting opinion contends that "both actual *and apparent* conflicts can have due process implications on the outcome of cases affected by *such* conflicts" and "[i]t is now clear, especially from the last motion for disqualification . . . that there are now [such] due process implications" in this case. Dissenting Slip Op., at 55 (emphasis added). The Dissenting opinion provides no legal analysis for this contention. Nor does the Dissenting opinion, or the Appellees herein, claim any actual bias or

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[11] This last motion seeking my disqualification was filed March 28, 2008, three-and-a-half years after my 2004 election, over seventeen months after the filing of this appeal on October 24, 2006, over four months after the initial decision of this Court on November 21, 2007 (in which I voted with the majority against the interests of the Appellees), and over two weeks after oral arguments were heard on the reconsideration of this appeal. The primary basis of this last disqualification motion was a survey taken by the Appellees which can best be described as a "push-poll"; *i.e.*, a survey wherein limited and selective background information is conveyed to individuals, the purpose or result of which is to "push" the individual being surveyed to a negative inference or response against a public individual. "Push-polls" are unlawful in West Virginia when used in elections. W. Va. Code § 3-8-9(a) (10) (1999). The motion was denied as being untimely and because "push-poll"-type surveys of this kind, are, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.

prejudice on my part in this case.[12] Indeed, neither the Dissenting opinion nor the Appellees herein point to any actual conduct or activity on my part

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[12] The Dissenting opinion uses the phrase "both actual and apparent conflicts" in describing the type of conflict to which the Dissenting opinion believes that due process implications may attach. The Dissenting opinion, however, omits any legal analysis to define what it contends is meant by the term "apparent." If "apparent" means "obvious," the phrase would simply mean those conflicts which are *both* actual *and* obvious. Such a meaning comports with a legitimate concern for "actual" conflicts (such as *actual* biases and prejudices which directly implicate due process) which are also plainly evident to the judicial officer and the public (implicating a duty to recuse and a concern for public confidence). Conversely, though, the Dissenting opinion may instead intend the term "apparent" to be a wholly separate form of conflict, distinct from an *actual* conflict. In that sense, the Dissenting opinion's footnote would refer to either of two separate and distinct types of conflicts which may implicate due process considerations: actual conflicts and appearance-driven conflicts (conflicts subjectively-defined according to criteria which may vary from observer to observer). The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process.

Although the Dissenting opinion provides no legal analysis to define the phrase, it would seem that the dissenters advance an inconsistent subjective standard. Because both the Dissenting opinion and the Appellees in essence concede that there is no objective "actual" conflict or improper actions or conduct herein with respect to me, the Dissenting opinion proposes that a conflict sufficient to implicate due process considerations for which disqualification is necessary may be *either* an "actual objective conflict" (which is not applicable herein) or a "conflict created by or defined by subjective appearances" (which they perceive is present herein).

which could be termed "improper."[13] Rather both the Dissenting opinion and the Appellees focus on appearances – some generated by the media, some generated by a recused member of this Court with a history of verbal discourtesies toward Appellant

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[13] Canon 2A, of the W. Va. Code of Judicial Conduct, prohibits judges from engaging in activities which are improper or which give the appearance of impropriety. Often, this term is taken out of context by omitting reference to the term "activities." That some form of action by a judge is necessary in context with the term "appearance of impropriety," is evident from the Commentary to Canon 2A which focuses on "irresponsible or improper *conduct* by judges." (Emphasis added.) Furthermore, Canon 2A specifically applies to activities or conduct of the judge, himself or herself, not activities or conduct of third-parties or litigants which are outside the judge's control. While challenges to a judge because of the independent activities of a third-party may be an acceptable practice in a system focused on "political or appearance-based justice," it finds no basis in Canon 2A. Unless the dissenters or Appellees herein contend that the act of lawfully running for elective office or the required duty of judging a case is an activity within the purview of Canon 2A, the dissenters and Appellees must necessarily contend that appearances caused by the past activities of third-parties over which a judge or a judicial candidate exercises no control, from which he or she seeks no benefit, and for which he or she will obtain no current or future benefit may nevertheless serve as a basis for disqualification. *See* Footnote 15, *infra* (West Virginia is a "duty to judge" judicial system). *See also State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995) (running for office is a fundamental right). Such a scenario, particularly where the supposed conflict occurred in the past with no potential for current or future benefit to the judge based upon his or her decision, would serve to open the judicial system to easy manipulation by external forces and would lead to a destruction of public confidence in our judiciary.

Massey, and some generated herein by the Appellees, themselves.

By its inclusion of Footnote 16, one must conclude that the Dissenting opinion advocates that the concept of "appearance-driven" judging should bring about a different substantive outcome in this matter. That is disappointing. Justice should not be determined more by the popularity, or lack thereof, of a given litigant or a given result than by the rule of law. Rather, justice must always emphasize the importance and definiteness of the law in the resolution of disputes. In that manner, my participation herein was wholly consistent with due process.[14] Because of the reference to the disqualification issue in Justice Albright's Dissenting

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[14] In a judiciary founded on the rule of law rather than political artifice, it is an extraordinary and unprecedented argument which contends that "*apparent* conflicts" alone can have such an effect on the outcome of a case that due process considerations are implicated. While appearances should be considered in a discussion of public confidence in the judiciary, appearances alone, subject as they are to manipulation by partisan elements (including litigants), should never alone serve as the basis for a due process challenge to an otherwise well-founded legal opinion of a court of law. Public confidence is enhanced by a system founded on actualities and the rule of law. Appearance-based criteria for judicial disqualification emphasizes the importance of "public confidence" in the judiciary as its most important value, not judicial independence, the accuracy of justice, or stability and predictability in our judicial system. Public confidence is a legitimate concern for our judicial system – but not in a vacuum. Concerns within the judicial system must be balanced. In the long run, I believe that judicial independence, the accuracy of justice and the stability and predictability of our judicial system are far more important to the public's long-term confidence in our judicial system.

opinion, I feel obligated to comment on this matter of "apparent conflict."

A. The Measure of Fairness: Actual Justice

The fundamental question raised by the Appellees and the Dissenting opinion herein is whether, in a free society, we should value "apparent or political justice" more than "actual justice." The latter is dependent on the quality of the law applied by a court and is measured by the critical analyses of a court's written decisions. Actual justice is based on actualities. Through its written decisions, a court gives that transparency of decision-making needed from governmental entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end-result as measured by dominant partisan groups such as politicians and the media, or by the litigants, themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias. Since all cases will generally have a winner and a loser, a system based upon "apparent or political justice" will be the subject of constant criticism – all partisan, little academic.

To assuage attacks on itself, a court immersed in "apparent or political justice" will find it necessary to curry favor with those groups or individuals with the loudest or shrillest voices, as well as those groups or individuals with the most radical means of gaining public attention. In doing so, decisions not only will be biased toward certain groups and their favored positions, but decision-making will necessarily take on an inductiveness, where the desired end-result for a case determines the manner in which the court

conducts its legal analysis. Since justice then would be determined by the ebb and flow of political opinion, justice will become more actively policy-driven, and our judges, like terriers jumping for treats, will promote a judicial system decidedly unstable and unpredictable.

In direct opposition to the drive to appearance-based judging is Canon 3B(2), of the Code of Judicial Conduct, which requires that "[a] judge shall be faithful to the law and . . . not be swayed by partisan interests, public clamor, or fear of criticism." This ethical admonition succinctly dispels any contention that appearance-based judging should supercede judging based on actualities. Simply stated, a decision which is firmly rooted in legal substance should not yield to a collateral partisan attack which manipulates appearances. Rather, it should rise or fall on its own substantive merits.

Proper legal decisions should never be mere rationalizations fronting for political correctness. Nor should actual justice be fettered by the political expediencies of the day. Partisan rhetoric and resorts to emotion-laden rants betray a contempt for the judiciary's role in a constitutional government. Sadly, such political considerations have, it seems from recent behaviors, institutionalized and entrenched themselves in our Court. This politicization of our judiciary must be ended. Our judicial system should be resolutely founded on the rule of law, administered by conscientious and dispassionate judges, and legitimized through well-reasoned legal opinions. We must do *actual* justice to achieve *actual* justice. Public confidence requires no less.

B. Recusal and Due Process

West Virginia' s judicial officers have a duty to hear such matters as are assigned to them except those in which disqualification is required. Canon 3B(1).[15] This "duty to sit" is not optional. As Judge John Sirica eloquently stated:

> [T]he Court cannot overlook the fact that it has an obligation to deny insufficient recusal motions. There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when

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15 Canons 3A and 3B(1) of the W. Va. Code of Judicial Conduct require that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required" and that the "judicial duties of a judge take precedence over all the judge's other activities." Canon 3E(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned. . ." (Emphasis added.) The use of the qualifier, "reasonably," presupposes a knowledge of all facts material to an impartiality determination. It implies a thoughtful, impartial and well-informed observer. Furthermore, this qualifier helps to ensure that illegitimate attempts to remove an elected judge are unsuccessful. *See* Footnotes 11, *supra*, and 48, *infra* (use of push-poll-type survey conveying limited information legally insufficient as basis for disqualification of publicly-elected judge). Although some specific examples are given of situations in which a judge should recuse himself or herself, the standard itself is indefinite in recognition of the balancing of interests which must occur when a judge considers recusal. Extreme cases are clear under any standard. The key consideration appears to be that a judicial officer should not judge a case where his or her own personal interests could be preferred over the rule of law. The rule is certainly not an invitation for litigants to attempt to manipulate the system for strategic reasons, nor is it a means by which judges may avoid difficult cases.

> there is. . . . After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preferences or individual views as it does the law. I have no choice in this case . . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

U.S. v Mitchell, 377 F.Supp. 1312, 1325-26, (D.C. Cir. 1974) (internal citations omitted), *aff'd sub nom. Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) (en banc), *cert denied*, 418 U.S. 955, 94 S.Ct. 3232, 41 L.Ed.2d 1177 (1974).

Matters related to a state's method for selection and disqualification of its judicial officers belong appropriately to the individual states. "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948). *See Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 411, 71 L.Ed. 749 (1927) ("[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."); *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."). *See also Wheeling v. Black*, 25 W. Va. 266, 270 (1884) (disqualification of judicial officer from duty to judge because of an actual interest in a cause of action deemed to be a matter of legislative discretion). The focus is on what actually affects a judge's decision-making.

The Due Process Clause simply does not establish a "uniform standard," such as the Appellees and the Dissenting opinion seek to portray herein. It establishes a "constitutional floor." *Bracy*, 520 U.S. at 904-05, 117 S.Ct. at 1797. This due process "floor" is "a 'fair trial in a fair tribunal,' before a judge with no *actual* bias against the defendant *or interest in the outcome of* his particular case." Id., at 904-05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (citations omitted) (emphasis added).[16]

It has long been recognized that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. Due process therefore requires recusal only in those rare cases wherein a judge or justice has a "direct, personal, substantial [or] pecuniary interest" in the outcome of the case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S.Ct. 1580,

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16 "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 494 (1972). It is "not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Thus, its "very nature . . . negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* Here, the Appellees and the Dissenting opinion would render all relevant facts and policies related to an individual judge's recusal consideration and a state's balancing of interests in election laws and judicial ethics immaterial in favor of a static rule of disqualification determined by appearances which are themselves subject to ready manipulation by litigants and third persons with an interest in the outcome of a given case.

1585, 89 L. Ed. 2d 823 (1986) (quoting *Tumey*, 273 U.S. at 523, 47 S.Ct. at 441).

The Dissenting opinion's conjoining of real and apparent conflicts mistakenly suggests an equality between actual conflicts and appearance-driven conflicts unsupported by the law with respect to claims of constitutional violations. A proper ordering of claimed conflicts is necessary to define a due process framework that separates legitimate claims of actual constitutional impairment from illegitimate claims; especially where illegitimate claims serve to divert attention from the legal certainty of a court's decision and the inability substantively to challenge that decision. Under the self-serving due process standard of disqualification proposed by the Appellees and the Dissenting opinion herein, the actual purpose of due process would be frustrated by litigants who would hold a near-veto power over the composition of a publicly-elected court, by those who could wage public relations campaigns designed to malign judicial officers in order to manufacture "apparent conflicts," and by those who would challenge a decision not by its legal correctness, but by its political correctness. The long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable.

The Dissenting opinion's passing reference, without analysis, to *Aetna* and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), fails to support its contention that there are due process implications herein based simply on subjective perceptions of "appearances." *See Aetna*, 475 U.S. at 822-24, 106 S.Ct. 1585-87 (due process required disqualification of state supreme court justice

because he had a "direct, personal, substantial, [and] pecuniary interest" in deciding a case in such a manner as to "enhanc[e] both the legal status and the settlement value of" the judge's own similar pending lawsuits); *In re Murchison*, 349 U.S. at 133-39, 75 S.Ct. at 624-27 (due process required disqualification of judge who served as a "one-man grand jury" and then presided over the criminal trial of the man whom he had prosecuted). *See also*, *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954) (due process implicated where a judge who harbored actual bias against an attorney nevertheless sat in judgment of the attorney in a contempt proceeding); *Tumey*, 273 U.S. at 523, 535, 47 S.Ct. at 441, 445 (due process violated where mayor who presided over mayor's court had a direct financial interest in convicting defendants and in imposing fines). Indeed, the phrase used by the Dissenting opinion, "both actual and apparent conflicts," appears nowhere in either *Aetna* or *In re Murchison*.

Neither Appellees nor the Dissenting opinion have presented any evidence consistent with the *Aetna* standard for implication of the Due Process Clause of the Fourteenth Amendment. Rather, they rely on subjective, after-the-fact speculations and assumptions. "The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392, 158 L.Ed. 225 (2004) (Scalia, J.) (Memorandum on Motion for Disqualification) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000) (Rehnquist, C.J.) (Memorandum regarding recusal).

Reliance on cases such as *Aetna* and *In re Murchison* for the contention that disqualifications of a publicly elected judicial officer may be based solely upon after-the-fact appearance-based or politically-driven conflicts is consequently misplaced. Unlike the judges in *Aetna* and *Tumey*, I have no pecuniary interest in the outcome of this matter. Unlike the prosecutor/judge in *In re Murchison*, or the judge/mayor in *Tumey*, I have no conflicting dual role in this matter. Unlike the judge in *Offutt*, I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.

Nor do the due process contentions of the Appellees and the Dissenting opinion find support in other venues. Although federal judges arguably no longer have a "duty to sit,"[17] the federal recusal statute at 28 U.S.C. § 455(a) (1990) does reference "appearances of impropriety." *See* Footnote 13, *supra*. Federal courts have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications. As recently recognized by the Third Circuit, no decision "has held or clearly established that an appearance of bias on the part of a judge, without more, violates the Due Process Clause." *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 544 U.S. 924, 125 S.Ct. 1639 (2005); *accord Callahan v. Campbell*, 427 F.3d 897, 928-29 (11th Cir. 2005); *Del Vecchio v.*

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[17] Although it has been asserted that changes in 1974 to the federal recusal statute, 28 U.S.C. § 455 (1990), were designed to eliminate a judge's "duty to sit" (*See Baker v. City of Detroit*, 458 F.Supp. 374 (E.D. Mich. 1978), federal judges continue to have a duty not to disqualify themselves without a reasonable basis. *See, e.g., Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983).

Illinois Dept. of Corrections, 31 F.3d 1363, 1371-82 (7th Cir. 1994) (*en banc*). In *Johnson*, the Third Circuit concluded that, absent some other disqualifying conflict, appearances alone do not implicate due process considerations. In *Del Vecchio*, the Seventh Circuit similarly held that "bad appearances alone do not require disqualification" pursuant to the due process clause because "only a strong, direct interest in the outcome of a case is sufficient to overcome [the] presumption of [the judge's] evenhandedness." *Del Vecchio*, 31 F.3d at 1372-74. "[T]he United States Supreme Court has never rested due process on appearance." *Id.* at 1372 n. 2. As pointed out in a concurrence in *Del Vecchio*, disqualification based upon appearance-based conflicts "is a subject for statutes, codes of ethics, and common law, rather than a constitutional command." *Id.* at 1391 (J. Easterbrook, concurring).[18]

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[18] The "apparent conflict" standard advanced by the Appellees and the Dissenting opinion would also lead to the rather bizarre situation in which a judge with an actual bias or interest in the outcome of a case would nevertheless sit in the case, while a judge with absolutely no bias, prejudice or interest in the outcome of a case could be forced off of the case by the manipulation of appearances outside of the judge's control. For example, if a judge develops an actual animosity toward a litigant or to counsel during a case, recusal is not required. *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 1155, 127 L.Ed. 2d 474 (1994). Therefore, under the standard set forth by the Dissenting opinion, a judge without any bias whatsoever could be disqualified so long as it could be claimed that there was an "apparent conflict", but a judge who had an actual bias could remain on a case so long as that bias developed during the pendency of the case. The same scenario is presented by the Rule of Necessity, in which justices with actual interests in the outcome of a case may nevertheless be

C. West Virginia Has Chosen to Select Judges in Partisan Elections

Historically, West Virginia has exercised its prerogative to regulate its judiciary and to elect judges and justices in partisan judicial elections through the enactment of constitutional and legislative standards, as well as by the Supreme Court of Appeals' adoption of ethical rules, that weigh and accommodate the competing interests at stake.[19] Incumbent in any state system which

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required to hear the case. *See* (Syl. pt. 7), *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994) ("The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.") Such inconsistencies highlight the fundamental flaws of the "apparent conflict" standard posed by the Dissenting opinion.

Furthermore, the only limitation to recusal motions based upon an appearance standard would be the imagination of a party. Would judges who are former legislators be subject to disqualification motions when reviewing legislation passed while they were members of the legislature? Would judges who are church members be subject to disqualification in cases involving issues such as abortion or "church and state"? Would former prosecutors be subject to disqualification in criminal cases because they were "law and order" prosecutors?

[19] *See* Footnote 3, *supra*. *See also Matter of Starcher*, 193 W. Va. 470, 475, 457 S.E.2d 147, 152 (1995) (reprimand of judge for violation of judicial ethics regarding improper *ex parte* communications with party during trial), wherein then-Chief Justice Neely, in dissent, stated, "In this State, judges get to be judges because they are political leaders . . ." *Matter of Starcher*, 193 W. Va. at 475, 457 S.E.2d at 152 (Neely, C.J., dissenting). While there may be disagreement within this State on the proper method for selection of its judicial officers,

selects its judicial officers through the electoral process, particularly through partisan elections, are potential problems. In spite of such potential problems, the citizens of West Virginia, like the citizens of many other states,[20] have decided that all state judicial offices must be subject to the electoral process. *See* W. Va. Const. art. VIII, § 2 (Supreme

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especially on whether elections should be partisan, it is, I believe, a decision for the people of this State to make. I must disagree, however, with those who believe that politics and partisanship, particularly during an election cycle, have any place in this Court or anywhere in West Virginia's judicial system. *See contra State ex rel. Rist v. Underwood*, *infra*, 206 W. Va. 258, 282, 524 S.E.2d 179, 203 (Starcher, C.J., concurring, at Appendix A, n. 8: "[J]udges make policy as a matter of choice as well as function, for most know that sweeping issues are involved and they act upon their personal values in resolving those issues.") *See also State ex rel. Carenbauer v. Hechler*, *infra*, 208 W. Va. 584, 609, 542 S.E.2d 405, 430 (Starcher, J., dissenting: "It is utterly absurd to suggest that judges just 'apply the law,' and do not make decisions that are influenced by their philosophies – or their 'prejudices' – the unfortunate term that the majority chooses to use."). In a system wherein judicial officers believe it appropriate to harbor political biases and prejudices and to bring those "personal values" to bear in the determination of cases, one might question whether public pronouncements by such judicial officers are politically-driven and are designed not to serve the rule of law but rather to affect the outcome of litigation or an election thereby elevating "apparent- or political-justice" over actual justice. The long-term negative impact on the public's perception of the judiciary caused by judicial officers who use their offices to serve political ends or who pander to partisan prejudices is deeply troubling. *See IV. A. "The Measure of Fairness: Actual Justice"* herein.

20 *See generally Adair v. State, Department of Education*, 709 N.W.2d 567 (Mich. 2006).

Court Justices must be elected by voters); W. Va. Const. art. VIII, § 5 (circuit court judges must be elected by voters); W. Va. Const. art. VIII, § 10 (magistrate court magistrates must be elected by voters); W. Va. Const. art. VIII, § 16 (family court judges must be elected by voters). Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office. This now includes those who contribute to or support so-called Independent Expenditure Groups who engage in political campaigns completely independent of candidates of office.

West Virginia has a compelling and permissible interest in regulating its elections, the political activities of its judicial officeholders and candidates, and the manner in which its judicial offices are filled. *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 599, 542 S.E.2d 405, 420 (2000). In fashioning its rules regarding judicial campaigns, West Virginia's legislature and this Court have balanced the necessary contributions and mechanisms for support which are involved in all public elections with the need to protect the system through rules of conduct to guard against improprieties in the election process. *See Carenbauer*, *supra*.

For example, Canon 5 of the West Virginia Code of Judicial Conduct establishes specific limitations on a judge's or judicial candidate's political activity. Included in these limitations is a specific limitation which prohibits a judge or judicial candidate from personally soliciting or accepting campaign contributions. Canon 5C(2), W. Va. Code of Judicial Conduct. A similar limitation is placed on judges

and judicial candidates seeking publicly stated endorsements. *Id.* Judges and judicial candidates may instead use committees within their campaigns, independent from personal knowledge or involvement of the judge or judicial candidate, to solicit campaign contributions and endorsements.[21] *Id. See In re Tennant*, 205 W. Va. 92, 516 S.E.2d 496 (1999) (judicial candidate admonished for personally soliciting campaign contributions); *Matter of Starcher*, 202 W. Va. 55, 501 S.E.2d 772 (1998) (admonishment of judge seeking election to Supreme Court of Appeals for personally soliciting publicly stated support); *In re Hill*, 190 W. Va. 165, 437 S.E.2d 738 (1993) (political endorsement of another judicial candidate by judge running for reelection not prohibited under Canon 7A(1) (b) of former-Judicial Code of Ethics (conduct now proscribed by Canon 5A(1) (b) of the current-Code of Judicial Conduct, effective January 1, 1993)).

West Virginia has adopted other limitations on judicial elections. For example, in *Carenbauer*, this Court ruled that a sitting justice is ineligible to run for a different seat on the Supreme Court prior to the expiration of his or her term. *Carenbauer*, 208 W. Va. at 598-600, 542 S.E.2d at 419-21. In *Carenbauer*, former-Justice Warren McGraw, who had been elected in 1998 to complete the remaining half of his judicial office's term, sought to run again

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[21] A "Finance Committee" was used by all of the Supreme Court judicial candidates for the 2004 election. There were no allegations of any ethical issues related to the funding of any of such candidates' campaigns. Campaign finance reports from the 2004 Supreme Court election may be viewed at the website of the West Virginia Secretary of State. *See* http://www.wvsos.com.

in 2000 for another seat on the Court with a full twelve-year term. In ruling former Justice McGraw ineligible to run for a separate seat on the same court on which he was already sitting, this Court concluded that the State had a compelling and permissible interest in regulating political activities in judicial offices. *Id. See also Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993) (public censure of judicial officer for violating Judicial Code of Ethics related to misleading campaign advertisements).

In *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 524 S.E.2d 179 (1999), this Court considered a challenge to the Governor's appointment of the then-current Speaker of the House of Delegates as a Justice on this Court pursuant to the Governor's appointment powers for vacancies on this Court. *See* W. Va. Const. art. VIII, § 7. This Court ruled that, under the Emoluments Clause of the West Virginia Constitution, the appointment was prohibited where, during the Speaker's current term of office, the Legislature had enacted a pay increase with respect to such judicial office. W. Va. Const. art. VI § 15.

West Virginia has enacted other rules applicable to judicial races.[22] For example, committees for candidates for the office of Justice of the Supreme Court of Appeals must file periodic verified financial statements detailing campaign contributions and

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[22] Candidates for the office of judge of the circuit court must have at least five years of active practice within the State. W. Va. Const. art. VIII, § 7; *State ex rel. Haught v. Donnahoe*, 174 W. Va. 27, 321 S.E.2d 677 (1984). Candidates for the office of justice of the Supreme Court of Appeals must have at least ten years of active practice within the State. *Id.*

expenditures with the Secretary of State. W. Va. Code § 3-8-5 (2007). West Virginia limits the contribution which an individual may give to a campaign to $1000 per election cycle. W. Va. Code § 3-8-12(f) (2005). Campaign contributors who contribute $250 or more must be identified by more detailed information, including address and business affiliation. W. Va. Code § 3-8-5a(a) (3) (2007). West Virginia, thus, achieves a measure of transparency in campaign funding in judicial races. Anonymous contributions are prohibited. W. Va. Code § 3-8-5a(I) (2007). Furthermore, corporations are prohibited from contributing to a candidate's campaign. W. Va. Code § 3-8-8(a) (2006). So-called Independent Expenditure Groups (or Section 527 Groups) are also subject to regulation, including registration requirements. W. Va. Code § 3-8-12(g) (2005).[23]

D. The 2004 West Virginia Supreme Court of Appeals Election

The Appellees and the dissenters take the position that, notwithstanding a judge's duty to hear cases in West Virginia and the lack of any actual disqualifying basis, due process compels my disqualification because of "appearances" they contend exist from my election some four years ago. Specifically, the Appellees and the dissenters contend the following: (I) in 2004, a political Independent Expenditure Group (or "527" Group) called And for the Sake of the Kids ("ASK") independently campaigned against former-Justice

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23 *See* Rist, 206 W. Va. at 285, 524 S.E.2d at 206 (J. Starcher, concurring: "West Virginians are ahead of the curve in judicial campaign finance regulation. . . . [C]ampaign finance committees insulate judicial candidates from fundraising.")

McGraw, in part with contributions made to it by Mr. Blankenship; (ii) I won election; and (iii) this case involves Mr. Blankenship's employer, Appellant Massey. While this self-serving and oversimplified account of the 2004 election may advance an "apparent conflict" standard, its omission of material facts of what actually occurred in 2004 is disturbing.

The Appellees fail to consider the following: (I) the decision herein was issued over three years after my election[24]; (ii) in West Virginia, elected judges have a duty to hear cases unless disqualification is required[25]; (iii) I neither have, nor at any time have ever had, any direct, personal, substantial or pecuniary interest, real or otherwise, in the outcome of this case; (iv) my campaign was completely independent of any independent expenditure group or individual, such as ASK[26]; (v) the outcome of the 2004 election was due primarily to my campaign's message of fairness, stability and predictability in decision-making, the importance of the rule of law to courts, and the need for judges to exercise civility,

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[24] Massey sought appeal of this case on October 24, 2006, nearly two years after my election. On March 15, 2007, this Court deferred consideration of Massey's petition seeking appeal. The said appeal was unanimously granted by the Court on April 5, 2007.

[25] W. Va. Code of Judicial Conduct, Canons 3A, 3B(1). This "duty to hear" is also referred to as a "duty to sit."

[26] Appellees merely presume the positive effectiveness of ASK and omit consideration of ASK's campaign against Attorney General Darrell McGraw's race in 2004 – which apparently came from the same budget. They give no consideration to the negative reaction which ASK may have had on many voters. Because they are independent, groups such as ASK and Consumers for Justice can both help and hurt candidates.

integrity and personal professionalism[27]; (vi) the campaign of my opponent, former-Justice McGraw, was devastated by a speech which he gave at Racine, West Virginia, on Labor Day, and by the effective publication of this speech to the people of West Virginia by the Benjamin campaign[28]; (vii) no improper act or conduct, and no appearance of an improper act or conduct with respect to this case, or any other case, has occurred on my part; (viii) nothing in my history as a jurist (including a number of cases involving Massey and/or its subsidiaries) reveals any bias or prejudice for or against any of the parties in this case;[29] (ix) no attorneys, other than

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[27] Additional significant material factors regarding the 2004 Supreme Court race were omitted from the Appellees' motions seeking my disqualification. For example, regarding the respective candidates' qualifications for office, *see* West Virginia State Bar Survey, http://www.wvbar.org/barinfo/announce/04JudQualPoll.htm. Furthermore, challenger Benjamin was endorsed over former-Justice McGraw by every major daily newspaper in West Virginia which did an endorsement in the race, except one newspaper. Former-Justice McGraw's refusal to debate was also a significant factor in his defeat.

[28] In this speech, former-Justice McGraw made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere. *See* Footnotes 35 and 38, *infra*.

[29] The Dissenting opinion would contend that due process considerations apply here, a case in which I voted for Massey's position, but strangely the Dissenting opinion makes no mention of its application in the other significant Massey cases wherein I voted against Massey's position. Indeed, the instant case may represent the only decision in which I have voted in favor of Appellant Massey's position and certainly does not represent the highest dollar value at issue for a case involving Massey. *See U.S. Steel Mining Co., LLC v Helton*, 219 W. Va. 1, 631 S.E.2d 559 (2005); *Helton v. Reed*, 219 W. Va. 557, 638

the counsel in this case,[30] have ever sought my recusal in a matter involving Massey – including the current administration and West Virginia's Attorney General[31]; and (x) former-Justice McGraw was, and

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S.E.2d 160 (2006); *Massey Energy v Wheeling-Pittsburgh Steel Corp.*, No. 080182 (05/22/08). *See also Conflict*, Charleston Gazette, 02/26/08 ("Four times since 2005, [Justice Benjamin] has voted against Massey's interest in cases.")

[30] Since I have been a Justice on this Court, the attorneys involved in this case are the only counsel who have sought my recusal in a Massey matter (noting that counsel for Appellee Harman Mining is also counsel of record in *Wheeling-Pittsburgh Steel Corp.*, *see* Footnote 29 above, and, with local counsel, also moved for my disqualification therein on same grounds as set forth herein.)

[31] Although the same facts upon which the Appellees seek my disqualification in this case have been present at all times since my election, the State of West Virginia, by the Attorney General, Hon. Darrell McGraw, has never sought my disqualification. *See, e.g., Helton v. Reed*, *supra* or *U.S. Steel Min. Co., LLC v. Helton*, *supra*. Attorney General McGraw [illegible] former member of this Court and is the brother of for[illegible]r-Justice Warren McGraw. Furthermore, the Department of Environmental Protection of the State of West Virginia has also declined to seek my disqualification in potential appellate environmental litigation involving Massey. According to a 11/03/2005 article by Ken Ward, Jr., in The Charleston Gazette, one year after my election, state regulators saw "no reason" to ask me to recuse myself. According to Perry McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking my disqualification. Mr. McDaniel stated, "There are clearly no grounds . . . for us to ask a Supreme Court justice elected by the people to step down in this matter." Such conclusions, as well as a jurist's actual record of decisions and behavior in office, are

had been for several decades, a colorful and controversial politician[32] in West Virginia and had an extremely contentious Democratic primary race in 2004 where significant electoral support went to his opponent, Circuit Judge Jim Rowe.[33] The law

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arguably material to a "perception" argument regarding recusal.

32 "[McGraw] is one of the most polarizing figures in West Virginia politics today." Hoppy Kercheval, *Hoppy's Commentary for Tuesday*, MetroNews, April 20, 2004.

33 This primary race was controversial. *See* Footnote 47, *infra*. "According to media reports published just after the May 11 primary election, [Independent Expenditure Group] Consumers for Justice was identified as having 'attacked' Greenbrier County Circuit Judge Jim Rowe, who was seeking to unseat incumbent . . . Justice Warren McGraw." Juliet Terry, *Political Groups' Donations Questioned – Consumer Attorneys Group Gave More than $500,000 to state 527 Organization*, The State Journal, 09/03/04. *See also* Footnote 41, *infra*. Former-Justice McGraw defeated Circuit Judge Jim Rowe in the Democrat primary by a margin of 147,030 (56.7%) to 112,199 (43.3%). *See* West Virginia Secretary of State, http://www.wvsos.com/elections/history/results/04%democrat_statewide%20offices.pdf. Immediately after the primary, Forest J. Bowman, professor *emeritus* of the West Virginia School of Law, stated, "Benjamin does have a shot against McGraw because he stands to capture much of the 'Rowe vote.'" Juliet Terry, *McGraw Looks to November; Benjamin Faces Uphill Battle*, The State Journal, 05/14/04. This sentiment was echoed by Steve Roberts, president of the West Virginia Chamber of Commerce, "The latest numbers indicate about 110, 000 Democrats said 'no thank you' to McGraw. That sends a very strong message that they are dissatisfied with the direction the McGraw court has taken." *Id.* According to one political commentator, if the general election were held immediately after the primary, "Benjamin could already expect to have about 40 percent of the vote."

simply does not support the Appellees' position. As such, the disqualification issue herein gives the appearance of being a diversion away from the solid basis for the majority's opinion herein.

Under the rules of this Court, the determination of whether a Justice should recuse him/herself from a case is left to the discretion of the individual Justice.[34] Of course, this discretion is tempered by the decision in *Aetna*, which held that "'it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.'" *Aetna*, 475 U.S. at 821-22, 106 S. Ct. at 1585 (quoting *Tumey*, 273 U.S. at 523, 47 S. Ct. at 441). Although I declined to recuse myself from this case, this Court did not invoke its authority under *Aetna* to remove me from the case. Simply put, I do not have, nor was there any evidence to show that I had a "direct, personal, substantial, pecuniary interest" in this case.

1. The Speech at Racine, West Virginia

During the 2004 general election, I ran as the Republican nominee for a seat on this Court. My incumbent opponent, former-Justice Warren McGraw, was the Democratic nominee. In the election, I received 382,036 votes (or 53.3%) and former-Justice McGraw received 334,301 votes (or 46.7%). *See*, West Virginia Secretary

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Chris Stirewalt, *Surprises are hard to come by*, Charleston Daily Mail, June 8, 2004.

[34] *See* Rule 29 of the West Virginia Rules of Appellate Procedure.

of State, http://www.wvsos.com/elections/history/results/allgeneral04.pdf.

Contrary to some who seek to minimize or dismiss it, the pivotal moment of the 2004 campaign was a Labor Day speech delivered by former-Justice McGraw at Racine, West Virginia. During that speech, Justice McGraw spoke in a screaming and unflattering manner.[35] Excerpts from the Racine speech were extensively aired as campaign advertisements by the Benjamin campaign throughout the State.[36] In the relevant text of the speech, Justice McGraw was screaming that people were following him "looking for ugly."[37] The

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35 In this speech, former-Justice McGraw said, among other things: "My opponents want to portray the people of my party as if we are evil people. They want to tell you that the issue of abortion is one which is promoted by the Democrats. I say to you that's false! They want to tell you that members of my party have opposed school prayer. False! Not so! It's the Republican Party! The members of the Republican Party on the United States Supreme Court, and President of the United States, who gave you those issues when they control the Court and the people over in Washington. Not the Democrats. And just this year, not more than six months ago, the United States Supreme Court approved gay marriage! Not Democrats! And you people ought to know that! And the Republicans ought to know that!" The entire Racine speech by former-Justice McGraw is available on the internet. *See* http://hillary.repeatable.com/watch-video/TQ6nQaE2FM8/WVCALA/warren-mcgraws-rant-in-racine.html

36 The Benjamin campaign's advertisement may be heard at http://easylink.ovsmedia.com/onlinevideoservice/aapc/2005/ovs51-RacineRant.wax.

37 An analysis of the 2004 campaign is available at Hon. Brent Benjamin, Speech at the Annenberg Public Policy Center Symposium: Judicial Advertising, National Press

McGraw speech at Racine soon became the subject of much conversation around West Virginia.[38] In the

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Club, 05/25/07 (pp. 41-51). *See* http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=219.

[38] Shortly after political advertisements focusing on former-Justice McGraw's Racine speech was aired, the following observations of the speech were given by a statewide radio host and political commentator:

> . . . Last week, Supreme Court Justice Warren McGraw gave a campaign speech at the annual Labor Day picnic in Boone County that has given his opponents ammunition. Gant and Dean gave their opponents short sound bites; McGraw gave his opponents a whole speech. McGraw sounded as though he was coming unhinged as he ranted about his opponents following him around to take pictures of him to make him look ugly. He charged, erroneously, the "U.S. Supreme Court had approved gay marriage."
>
> A political consultant I talked with, known to be supportive of McGraw, told me the tirade by McGraw was "deeply disturbing." The consultant said the speech was "way over the top."
>
> In fact, it was. . . . McGraw's rants sound deranged, not passionate. His normally populist tone has been replaced by an angry tirade.
>
> . . . Yesterday when I talked about the speech on "Talkline" and played the GOP commercial, the phone lines were jammed with callers, mostly agreeing McGraw sounded on the verge of losing his mind.

Hoppy Kercheval, *Warren McGraw Unhinged*, MetroNews Talkline, September 15, 2004, http://www.freerepublic.com/focus/f-news/1263046/posts. *See also* Matt Bieniek, *Commentary: Paranoid Politics*, The Martinsburg Journal, September 27, 2004 ("[McGraw] said that the United States Supreme Court (which he pointed out is dominated by Republicans) had approved gay marriage. A

final analysis, former-Justice McGraw simply could not defend himself against his own words.[39]

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complete falsehood coming from a man who obviously knew better [sic]. . . . But then when McGraw is given an opportunity to speak to the public and debate his opponent, he doesn't take advantage of it.")

[39] Prior to the speech at Racine, former-Justice McGraw declined an invitation to a debate sponsored by the League of Women Voters. Shortly after the speech, a spokesman for former-Justice McGraw defended the remarks at Racine: "[T]hey don't understand that that's just the southern way of campaigning.. . . Criticizing him for the way he talks is pure Yankeeism. He's not insane or losing his mind. That's just campaigning, southern-style." Juliet Terry, *Benjamin Camp Says McGraw Defeat Possible*, The State Journal, 09/24/04.

Former-Justice McGraw, himself, has acknowledged the impact which his speech at Racine had on his campaign. During the primary, Justice McGraw was involved in an automobile accident. Subsequent to his defeat, Justice McGraw filed a personal injury lawsuit against the other driver in which he claimed that this accident caused him to act as he did at Racine four months later:

> Due to the defendants' negligence in causing the automobile accident and severely injuring the plaintiff, plaintiff was portrayed in an extremely negative light due to the footage [from] the political rally filmed after the accident. Due in part to defendants' actions, Mr. McGraw lost the election, whereby [sic] losing his job and his yearly salary for the 12-year term.

Chris Dickerson, *Former Supreme Court Justice McGraw Suing Active Member of Navy*, West Virginia Record, September 6, 2006.

2. Section 527 Independent Expenditure Groups

The primary thrust of the Appellees' argument is not that I should be disqualified because a party or attorney to the instant case directly contributed to my campaign. The Appellees' argument is that I should be disqualified because, without my knowledge, direction or control, an independent nonparty organization, ASK, received contributions from people or groups that included an employee of a party in this case, and ASK independently used its contributions to wage a campaign against my opponent four years ago.[40] If the Appellees'

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[40] The Appellees focus upon the amount of the contributions that Mr. Blankenship made to ASK. All such contributions and expenditures were completely independent of the Benjamin campaign, were lawful, were limited to the judicial election, and were apparently fully reported. Assuming, for the sake of argument, that the amount of a contribution given to a Section 527 political organization is to be the yardstick for *per se* disqualification, what amount should act as the minimum necessary for disqualification? Should that amount be $1 million dollars, $500 thousand dollars, $100 thousand dollars, $50 thousand dollars, $10 thousand dollars, or $1 thousand dollars? Further, should any purported minimum amount be the same for both Supreme Court Justices, who must run a state-wide campaign, and other state judicial officers, who only have to run in a few counties at most? Finally, if such a minimum amount is to be established, who should set this minimum amount, the judiciary or the legislature? In addition, should any such contribution require disqualification forever? Or for only a certain period? Or for only those cases actually pending before the Supreme Court of Appeals at the time of the contribution? Or for only those cases pending somewhere in the West Virginia judicial system at the time of the contribution? Or for those cases which *might* be contemplated to be filed

argument became the law, every judicial officer in this state would be disqualified from any and every case in which an independent nonparty organization over which the judicial officer had no control received contributions from individuals or groups which included a person or entity affiliated with a party or an attorney in the case, when the independent nonparty organization used its contributions to wage a campaign against the judicial officer's electoral opponent. Conversely, such a standard would likely require a judge also to recuse himself or herself when an independent expenditure group operated against the judge or supported the judge's opponent. Our judicial system would break down under such a standard for disqualification.

Two primary "Section 527" Independent Expenditure Groups operated during the 2004 Supreme Court election. The first, Consumers for Justice, stridently opposed my candidacy.[41] Five

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[Footnote continued from previous page]
somewhere in the West Virginia judicial system at the time of the contribution?

[41] The first Section 527 independent expenditure group formed during the 2004 Supreme Court race was a group which called itself, Consumers for Justice. Although it later turned out that Consumers for Justice was created as early as April 1, 2004, and began collecting and spending funds as early as April 13, 2004 (a few weeks before the end of the primary election), Consumers for Justice did not file its required paperwork notifying the IRS of its tax-exempt 527 status until June 30, 2004. Juliet Terry, *527 Groups to Play By New Rules*, The State Journal, 02/03/06. IRS rules require a 527 group to generally file its paperwork within 24 hours of being established. *Id.* According to a campaign finance report dated July 12, 2004, corporate contributions were the largest source of contributions to Consumers for Justice. Juliet Terry, *Political*

weeks after Consumers for Justice filed its first campaign finance report, IRS documents indicate that ASK was founded on August 20, 2004, as a Section 527 independent political organization by Carl Hubbard and Dr. Daniel J. McGraw. See 26 U.S.C.A. § 527 (Supp. 2008). The United States Supreme Court has made the following observations regarding Section 527 political organizations:

> Section 527 political organizations are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.

McConnell v. Federal Election Comm'n, 540 U.S. 93, 174 n.67, 124 S. Ct. 619, 678 n.67, 157 L. Ed. 2d 491

[Footnote continued from previous page]
Groups' Donations Questioned - Consumer Attorneys Group Gave More Than $500, 000 to state 527 Organization, The State Journal, *supra*. Five weeks after this filing, by Consumers for Justice, ASK established itself as a 527 group on August 20, 2004. Juliet Terry, *527 Groups to Play by New Rules*, The State Journal, *supra*. Consumers for Justice raised and spent approximately $2 million in the 2004 campaign against opponents of former-Justice McGraw. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22659'&criteriaName='West+Virginia+Consumers+for+Justice'.

(2003) (internal quotations and citation omitted). A Section 527 "political organization need not declare contributions, dues, or fund-raising proceeds as income if the organization uses this money for the influencing or attempting to influence the selection, nomination or appointment of any individual to any Federal, State or local public office." *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003) (internal quotations and citation omitted).

According to documents filed by ASK with the IRS, during the period from August 20, 2004, to December 31, 2004, ASK received contributions that totaled $3,623,500.[42] Public records show that out of the total contributions received by ASK, Mr. Blankenship personally contributed $2,460,500. The remaining contributions, totaling $1,163,000, were given by other individuals and organizations. According to ASK founder, Dr. Dan McGraw, "We are transparent about who we are and who we receive money from. . . . We are allowing Warren McGraw's record to come under scrutiny." Juliet Terry, *Attack Ads Dominate Court Race*, The State Journal, 10/22/04.

ASK spent an unknown amount of its contributions during the general election period "running ads assailing [Justice] McGraw's vote in a 3-2 court edict that reinstated probation for convicted child rapist Tony Dean Arbaugh." Mannix

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[42] This information is available to the public through the website of the Internal Revenue Service. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22903'&criteriaName='And+For+The+Sake+Of+The+Kids'.

Porterfield, *For the Sake of Kids gets $2.5 Million*, Register-Herald, October 15, 2004.[43] In *Arbaugh*, the Court's majority opinion indicated that defendant would be allowed to work as a janitor in a local Catholic school, but after school officials learned of the defendant's sexual assault record, he was prevented from working at the school. *See State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004).[44]

As a result of ASK's efforts to defeat Justice McGraw[45], and because of Mr. Blankenship's contributions to ASK, the Appellees contend that these indirect and independent acts constitute grounds for my recusal from the instant case. I disagreed with the Appellees' motions seeking to have me recuse myself because I had no role and no control in anything that ASK did during the campaign; nor did I have any role in causing Mr. Blankenship or anyone else to contribute to ASK or otherwise do or not do anything in the 2004 Supreme Court election. The federal statute under which ASK operated expressly permitted it to obtain donations that could be used to attempt to defeat anyone running for a local, state, or federal office. *See*

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[43] Reproduced at http://www.wvcag.org/news/fair_use/2004/10_15.htm.

[44] Although the *Arbaugh* case had an impact, the speech at Racine had a more fundamental impact on the general election. The *Arbaugh* decision was used during the Democratic Primary by those opposed to former-Justice McGraw's election, but former-Justice McGraw nevertheless defeated his opponent, Circuit Judge Jim Rowe, in the Democratic Primary.

[45] In failing to understand the fundamental role which the speech at Racine had in former-Justice McGraw's defeat, Appellees simply presume the absolute effectiveness of ASK's campaign.

McConnell v. Federal Election Comm'n, 540 U.S. at 174 n.67, 124 S. Ct. at 678 n.67, 157 L. Ed. 2d 491. The fact that ASK invoked its federal right to take a position against Justice McGraw is not a valid evidentiary basis upon which to establish that I could not fairly and impartially decide the merits of the instant case.

E. Lawful Campaign Contributions by Party or Attorney Not Sufficient to Disqualify Judicial Officer from Case

In this case neither ASK nor Mr. Blankenship are parties. Even if they were, the mere fact that they contributed money to defeat Justice McGraw is an insufficient reason alone to disqualify me, much less to require disqualification on a constitutional basis. On this point, the law is clear.

"[C]ampaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment." *Public Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743, 746 (W.D. Tex. 2000).[46] This is to say that "a judge is not required to

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[46] Courts considering disqualification motions related to direct contributions to the campaigns of judicial candidates have consistently recognized that "... judges are not required to disqualify themselves based solely upon the allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse. As long as the citizens ... require judges to face the electorate, either through election or retention, the resultant contributions to those campaigns ... are necessary components of our judicial system." *Nathanson v. Korvick*, 577 So.2d 943, 944 (Fla. 1991) (quoting *MacKenzie v. SuperKids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990).

disqualify himself or herself based solely on an allegation that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge." *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. Ct. App. 2007) (citation omitted). *See also Cherradi v. Andrews*, 669 So. 2d 326, 327 (Fla. Ct. App. 1996) ("Judges are not required to disqualify themselves solely upon an allegation that an attorney for a party had made a campaign contribution to the judge's political campaign."); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 640, 644-45, 5 P.3d 1059, 1062 (2000) ("In the context of campaign contributions, we have recognized that a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification. Indeed, we commented that such a rule would 'severely and intolerably' obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign contributions."); *In re Disqualification of Burnside*, 113 Ohio St.3d 1211, 1212-13, 863 N.E.2d 617, 619 (2006) ("[E]lected judges are generally not required to recuse themselves from cases in which a party is represented by an attorney who has contributed to or has raised money for the judge's election campaign."); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute

or, worse still, had contributed to that judge's opponent.")

The issue of lawful direct contributions to a judicial candidate's campaign was exhaustively addressed in *Adair v. State, Department of Education*, 474 Mich. 1027, 709 N.W.2d 567 (2006), as follows:

> That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice in Michigan in modern times who has not received campaign contributions from such persons. Nor is there a justice whose opponents have not received campaign contributions from such persons. And, increasingly, "opposition" campaigns have arisen in which contributions are specifically undertaken against particular justices. It is simply impossible for the Supreme Court, as well as most other courts in Michigan, to function if a lawful campaign contribution can constitute a basis for a judge's disqualification. For if a contribution to a judicial candidate can compel a judge's disqualification, then a contribution to an opponent, or the funding of an opposition campaign, must operate in a similar fashion. If so, it would be a simple expedient for a party or a lawyer to "mold" the court that will hear his or her cases by tailoring contributions and opposition contributions.

Even more fundamentally, however, "We, the people, of the State of Michigan," through the Constitution, have created a system of judicial selection in our state in which candidates are nominated by, and elected through, a political process. It is a different system of judicial selection than that which exists in other states and in the federal system, and reasonable persons can debate the merits and demerits of this system. Each of us in different forums has urged various reforms of this system. Nonetheless, the present system has been ordained by our Constitution, and it defines the environment in which those aspiring to judicial office must undertake their efforts.

The premise of our system of judicial selection in Michigan is that judges will periodically be held accountable for their performance. There are no lifetime appointments to judicial positions, and there are no unaccountable committees who determine whether judges should be maintained in office. Thus, the most notable strength of our system of judicial selection is that it requires candidates for judicial office to go out among the electorate and explain why they should be placed in office. This system fosters communication with the electorate, speechmaking, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred.

Such campaigns must be directed toward an electorate. . . . In the case of Supreme Court justices, such campaigns will typically involve the expenditure of hundreds of thousands, or even millions, of dollars on television, radio, newspaper, and other advertising, with opposition campaigns expending similar amounts. These expenditures are not funded magically, but are raised from among the electorate, and from organizations that represent those among the electorate.

Indeed, given the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns he poorly funded and result in candidates securing election on the basis of little more than a popular surname.

There will simply be no end to the alleged "appearance of impropriety" if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's participation in a case in which a contributor or an opposition contributor is involved. Again, while cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial

> participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 474 Mich. at 1041-42, 709 N.W.2d at 579-81.

Direct contributions to a judicial candidate's campaign are an insufficient basis, alone, to require disqualification. Therefore, contributions by a third-person to a completely independent campaign – with no ties to the judicial candidate – do not rise to a due process requirement of disqualification.

F. Conclusion

The integrity of judicial decisions is a direct extension of the integrity of the judicial role. The simple invitation to guess about hidden motivations of judges or colleagues on the bench caused by a selective recounting of facts or by the trafficking of innuendo and half-truths serves only to indulge suspicions and doubts concerning the integrity of elected officials. It serves only politics. It is drama. It is a diversion.

In many cases, including this one, publicity adverse to the judge or justice is a virtual certainty no matter what decision he or she makes. In such

cases, judges insufficiently attuned to their judicial responsibilities might readily welcome a baseless request for disqualification as an escape from a difficult case — particularly in a state which selects its judges in partisan elections. The public is legitimately entitled to more — they are entitled to judicial integrity and courage. To surrender to such recusal temptations would justly expose the judiciary to public contempt. It is the obligation of officers of the court system to ensure that professionalism, not partisanship, guides their actions and that cases are decided on the basis of the law, not in spite of it.

The determination of the composition of an appellate court panel by a standard merely of "appearances" seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day — a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations. Actual justice would be replaced by a justice borne of political gimmickry such as push-polls and media campaigns — all designed to replace judicial independence and integrity with something more to the liking of individual litigants or others with vested interests in specific outcomes. The rule of law would be replaced by the rule of expediency; judges would be forced to practice a "defensive" form of politically correct jurisprudence; and those without money or standing would be at the mercy of those with the power to manipulate and the willingness to impugn judges not to their liking.

It is perhaps an unfortunate aspect of timing that the pendency of the rehearing of this appeal has coincided with the pendency of a rigorous political campaign for two of five seats on this Court. During periods when change is possible in the philosophical

direction of the Court, the temptation by pundits, members of the media, litigants, candidates, special interest groups, or even members of this Court to politicize this Court and its decision is present. Although this Court has endured for 145 years, election cycles can be unsettling to the stability and predictability of the rule of law.[47] This puts a heavy

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[47] Recent election cycles involving seats on this Court have highlighted some of the difficulties incumbent in a system which incorporates partisanship or politics in its selection method, particularly when political rhetoric is generated from within this Court during an election cycle in which the Justice is not running. *See generally Matter of Starcher*, *supra* (admonishment of judicial candidate for Supreme Court of Appeals for personal solicitation of public support in violation of Code of Judicial Conduct) during 1996 election cycle; *State ex rel. Carenbauer v. Hechler*, 208 W. Va. at 600, 542 S.E.2d at 421 (Starcher, J., dissenting, n. 1: "As I file this dissent, there are eerie parallels between the majority's creation of a rule in the instant case that deprives the voters of West Virginia of their right to vote for a candidate – and the decision by a 5-to-4 majority of the United States Supreme Court to create a rule that prohibits the hand count of machine-rejected ballots in the Florida Presidential election, a procedure that is clearly authorized by state law and is as established and as American as apple pie!") during the 2000 election cycle; *Starcher Defends Behavior at Forum – Candidate Debate Turns Into Argument at State Bar Association Gathering*, The State Journal, March 25, 2004 (recounting shouting outburst from the back of the room by non-candidate Justice during 2004 Supreme Court candidate forum directed against candidate Judge Jim Rowe before members of the West Virginia Bar Association and the Kanawha County Bar Association, and also separate confrontation between same sitting Justice and candidate Judge Rowe in public mall. "'I've got to admit. It kind of threw me a little. Starcher's back there screaming, so what do you do? You move on,' Rowe said, 'I think it was totally inappropriate. And, in my opinion, it made him look bad.'" "The following

burden on the members of this Court to act in the highest standard of judicial professionalism, to refrain from exacerbating tensions, to avoid the highly emotional, to abstain from that which is deeply divisive, and to work judicially and judiciously.

Resort to appearance-based criteria alone in judging simply encourages the excesses often wrought on a judicial system during times of political

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week, Starcher said he does not regret speaking up the way he did. . . . Starcher believes his actions were completely within his rights. 'As a sitting justice, I don't park my rights at the courthouse,' he said.") during the 2004 election cycle.

Indeed, the frustrations caused to dedicated jurists by political rhetoric and partisan machinations from within the judiciary is not new, as reflected by Justice Scott, joined in the majority by Judges Jolliffe, Fox and Keadle (all imminently well-respected senior- and current-circuit court judges in this State):

> Finally, we would be less than forthright if we did not acknowledge the effects this candidacy has had on the ability of this Court to conduct its constitutionally-required duties with the element of collegiality necessary to properly effect judicial decision-making. While the process of judicial decisions implies disagreement, it also implies that the parties to such decisions must approach dispassionately the business of dispute resolution without personal animosity and with a healthy respect for honest differences of opinion. Unfortunately, this candidacy has brought with it an unhealthy pall of partisanship. [Footnote omitted.] The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.

State ex rel. Carenbauer v. Hechler, 208 W. Va. at 420, 542 S.E.2d at 599. Justice Starcher dissented.

struggle. "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance – for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." *United States v. Rabinowitz*, 339 U.S. 56, 86, 70 S.Ct. 430, 444, 94 L.Ed. 653 (1950) (J. Frankfurter, dissenting), *overruled, in part, Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). *See also Rogers v. Bellei*, 401 U.S. 815, 837, 91 S.Ct. 1060, 1072, 28 L.Ed. 2d 499 (1971) (J. Black, dissenting) (legal standards "should not be blown around by every passing political wind that changes the composition of this Court.").

Just as judges have a duty to the system, so too do counsel in cases appearing before the courts of this State. While counsel must endeavor to represent their clients zealously, they should do so with due regard to the profession they serve. I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. While such filings are appropriate when warranted, counsel should do so within the framework which has long served this judicial system. Such motions should include all facts material to the recusal decision. Omitted from the motions herein was any objective consideration of my actual record, my decisions and my behavior in over three years on this Court – the truest measure of a judge. Further, while the use of the term "support" is certainly permissible in a motion, the term, in a vacuum, can be misleading and its connotation remarkably subjective and indefinite. It is a term better given to political punditry and press releases

than, in the context of this case, the objective certainty needed in legal discourse. The well-drafted motion should acknowledge and discuss not only the motion's perceived strengths, but also the motion's actual weaknesses. The absence of such a critical analysis here, indeed the lack of even an acknowledgment of the motions' actual weaknesses, is directly relevant to the legal credibility of the said motions.[48] It is my purpose here to remind counsel appearing before this Court of their obligations to this Court and this judicial system.[49]

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[48] In a system dedicated to seeking actual justice, the absence of something so material as my actual record on this Court, my decisions and my behavior as a judge is so common-sense that its omission is disappointing. Further, the use of a survey which sounded more like a "push-poll", particularly long after the deadline for filing such a motion had passed and after the case was argued orally before this Court on rehearing, was not only disappointing, but also problematic if the purpose of the motion was legal in nature.

[49] This election period saw a great deal of misinformation. For example, it was erroneously reported that this Court diverted from its traditional rotation for the position of Chief Justice. Specifically, it was reported that members of this Court improperly rotated myself into the Chief Justiceship after current-Chief Justice Maynard when that position should have instead gone to Justice Albright. Attached as Exhibit 1 is a chart by the Court's Clerk, Rory Perry, detailing the rotation and dispelling any contention that I was improperly placed in rotation before Justice Albright. Indeed, the contrary argument simply makes no sense. Since this rotation has been in place, no justice has waited more than four years before becoming Chief Justice in their fifth year. As set forth by the current rotation, next year, my first as Chief Justice, will be my fifth year. Furthermore, the moment I took my place in rotation, Justice Albright became Chief Justice in 2005. At that point, the rotation was C.J. Albright (2005), J. Davis (2006), J.

In conclusion, I observe the note of caution expressed by now-Justice Stephen Breyer, who, while a judge on the First Circuit Court of Appeals, noted that "the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original) (citations omitted). For this reason, a "judge must still tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding the appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification." *Id.*

[Footnote continued from previous page]
Starcher (2007), J. Maynard (2008) and J. Benjamin (2009). To contend that somehow Justice Albright should have left his Chief Justiceship at the end of 2005 and somehow moved to the middle of the rotation line to place him as Chief Justice in 2009 is, frankly, absurd.

Unfortunately, this misinformation has taken on a life of its own. Moreover, some have insinuated that there was some form of conspiracy to place me behind Justice Maynard in rotation to affect the selection of replacement judges herein for those justices who have recused themselves. Such assertions are disturbing and grossly unfair to the two outstanding jurists, Judges Fox and Cookman, who served on this case and who are among the most highly-regarded jurists this State has ever produced. Judges and attorneys have an obligation to deal in facts, not conspiracy theories, lest their motives in pleadings and pronouncements come into question.

For these reasons, I concur in the Majority opinion.

Membership of Supreme Court of Appeals Each Year, 1972 – present Names in **CAPITALS** denote Chief Justice for that year (1980 was first year of CJ rotation by seniority, per attached order of Dec. 6, 1979)

Year	Members of the Court				
1972	Berry	Caplan	Calhoun/ Haden	Kessel	Carrigan
1973	Berry	Caplan	Haden	Sprouse	Neely
1974	Berry	Caplan	Haden	Sprouse	Neely
1975	Berry	Caplan	**HADEN**	Flowers	Neely
1976	**BERRY**	Caplan	Wilson	Flowers	Neely
1977	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1978	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1979	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1980	Miller	Caplan	McGraw	Harshbarger	**NEELY**
1981	Miller	McHugh	McGraw	**HARSHBARGER**	Neely
1982	**MILLER**	McHugh	McGraw	Harshbarger	Neely
1983	Miller	McHugh	**McGRAW**	Harshbarger	Neely
1984	Miller	**McHUGH**	McGraw	Harshbarger	Neely
1985*	**MILLER**	McHugh	McGraw	Brotherton	**NEELY**
1986	**MILLER**	McHugh	McGraw	Brotherton	Neely
1987	Miller	McHugh	**McGRAW**	Brotherton	Neely
1988	Miller	**McHUGH**	McGraw	Brotherton	Neely

* Notes on 1985, 1994-1995 and 2007: In 1985, Richard Neely served as Chief Justice through June 28, when Thomas Miller took over for the remainder of the year. In 1994, William Brotherton served as Chief until he suffered a heart attack in September. Richard Neely was Acting Chief for the remainder of 1994, and continued as Chief in 1995 until his resignation on April 15, when Thomas McHugh took over as Chief for the remainder of the year. On October 26, 2006, the rotation order was changed when Robin Davis was designated as Chief for a second year (2007) and Elliott Maynard was designated as Chief for 2008.

Other notes: As of November 20, 2007, the Chief Justice has been designated through the close of 2010, to-wit: Maynard 2008; Benjamin 2009; Albright 2010. When a current Chief Justice is unable to act, the next chief in line serves as the Acting Chief Justice.

1989	Miller	McHugh	Workman	**BROTHERTON**	Neely
1990	Miller	McHugh	Workman	Brotherton	**NEELY**
1991	**MILLER**	McHugh	Workman	Brotherton	Neely
1992	Miller	**McHUGH**	Workman	Brotherton	Neely
1993	Miller	McHugh	**WORKMAN**	Brotherton	Neely
1994*	Miller/ Cleckley	McHugh	Workman	**BROTHERTON**	**NEELY**
1995*	Cleckley	**McHUGH**	Workman	Albright	**NEELY/** Recht
1996	Cleckley/ Davis	**McHUGH**	Workman	Albright	Recht
1997	Davis	McHugh	**WORKMAN**	Starcher	Maynard
1998	**DAVIS**	McCuskey	Workman	Starcher	Maynard
1999	Davis	McGraw	Workman/ Scott	**STARCHER**	Maynard
2000	Davis	McGraw	Scott	Starcher	**MAYNARD**
2001	Davis	**McGRAW**	Albright	Starcher	Maynard
2002	**DAVIS**	McGraw	Albright	Starcher	Maynard
2003	Davis	McGraw	Albright	**STARCHER**	Maynard
2004	Davis	McGraw	Albright	Starcher	**MAYNARD**
2005	Davis	Benjamin	**ALBRIGHT**	Starcher	Maynard
2006	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2007*	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2008	Davis	Benjamin	Albright	Starcher	**MAYNARD**
2009	Davis	**BENJAMIN**	Albright		
2010	Davis	Benjamin	**ALBRIGHT**		
2011	Davis	Benjamin	Albright		
2012	Davis	Benjamin	Albright		
2013		Benjamin			
2014		Benjamin			
2015		Benjamin			
2016		Benjamin			

Compiled by Rory Perry
Updated on November 20, 2007

Exhibit 1

PETITIONER'S BRIEF

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(10)

No. 08-22

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

BRIEF FOR PETITIONERS

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

257 46

QUESTION PRESENTED

Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court—more than 60% of the *total* amount spent to support Justice Benjamin's campaign—while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., were defendants-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Sovereign Coal Sales, Inc., and Harman Mining Corporation are wholly-owned subsidiaries of Harman Development Corporation. Harman Development Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONERS

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The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 W. Va. LEXIS 22. J.A. 485a. Justice Benjamin's orders declining to recuse himself are not reported. *Id.* at 336a, 442a, 482a.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008. The petition for a writ of certiorari was filed on July 2, 2008, and granted on November 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

After a jury returned a $50 million fraud verdict against respondent A.T. Massey Coal Co. ("Massey"), Massey's chairman, CEO, and president, Don L. Blankenship, set out to single-handedly change the composition of the only state court that could hear Massey's appeal—the Supreme Court of Appeals of West Virginia. As Massey prepared its appeal, a previously unknown lawyer, Brent Benjamin, launched a challenge to the re-election of Supreme Court Justice Warren McGraw. In June 2004, Mr.

Benjamin's campaign appeared to be a long shot; his campaign committee had reported contributions totaling only $25,000. Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 27.

Benjamin's campaign began to gain momentum, however, after Mr. Blankenship threw his full weight (and great personal wealth) behind the campaign. Mr. Blankenship contributed the maximum amount permitted by West Virginia law to Benjamin's campaign committee. He then spent *3,000 times* that amount—some $3 million—to underwrite independent advertisements supporting Benjamin, while publicly urging others to make additional donations to the campaign. Ultimately, Mr. Blankenship was personally responsible for more than 60% of the total financial support for the Benjamin campaign—three times as much as Benjamin's own campaign committee. Upon Justice Benjamin's election to the state supreme court, some in West Virginia wondered aloud whether Massey had "b[ought] itself a judge." *See infra* pg. 8.

When Massey's case came before the newly-reconstituted Supreme Court of Appeals, petitioners repeatedly moved for Justice Benjamin to recuse himself from his principal financial supporter's case. Justice Benjamin refused, insisting that his participation "was wholly consistent with due process" because petitioners had not proven "any actual bias" on his part. J.A. 654a, 657a. He then cast the deciding vote in the court's 3-2 decision overturning the verdict against Massey.

Justice Benjamin's decision not to recuse himself was constitutionally flawed and should be reversed. Petitioners had a constitutional right to a panel of

"neutral and detached judge[s]" to decide this appeal (*Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972)), and, to preserve that right, Justice Benjamin was required to recuse himself not only upon proof of actual bias, but also when confronted with an objective "probability of actual bias." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Mr. Blankenship's extraordinary efforts on behalf of Justice Benjamin's campaign—undertaken when Mr. Blankenship was preparing to appeal a judgment of great personal and professional significance to the very court on which Justice Benjamin was seeking a seat—created a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey and against petitioners. Justice Benjamin's refusal to recuse himself denied petitioners their fundamental due process right to an impartial judge and, in so doing, substantially undermined the integrity of the West Virginia judicial system.

1. Massey is one of the Nation's largest coal companies. Until the corporate petitioners—Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.—were forced into bankruptcy by Massey's fraudulent business practices, they competed with Massey through the production of coal at the Harman Mine in Virginia. J.A. 488a.

This case arose out of Massey's efforts to obtain the business of LTV Steel ("LTV"), one of the principal purchasers of petitioners' coal. LTV had repeatedly refused to purchase Massey's coal because it "was inferior in quality to the coal obtained from the Harman Mine." J.A. 492a n.11. In an effort to secure LTV's business, Massey purchased the parent of Wellmore Coal Corporation ("Wellmore"), which was the sole direct purchaser of petitioners' coal and

which, in turn, resold that coal to LTV. *Id.* at 492a. "Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV." *Id.* LTV, however, refused to accept the substitution of Massey coal for Harman coal and severed its business relationship with Wellmore. *Id.* at 493a.

At the direction of Massey's CEO, Mr. Blankenship, Wellmore responded by invoking the *force majeure* clause in its coal supply agreement with petitioners Sovereign Coal Sales, Inc., and Harman Mining Corporation—a provision that excused nonperformance due to "acts of God, acts of the public enemy, epidemics," and other "causes reasonably beyond the control" of the parties—and drastically reduced the amount of coal that it agreed to purchase from petitioners. J.A. 64a, 490a n.8, 493a. As the trial court found, "Massey knew" that this "declaration" "would put [petitioners] out of business." *Id.* at 494a. Indeed, "Massey delayed Wellmore's termination of [the] contract until late in the year, knowing it would be virtually impossible for [petitioners] to find alternate buyers for [their] coal at that point in time." *Id.*

Massey simultaneously entered into negotiations with petitioners to purchase the Harman Mine. J.A. 493a. The trial court found that Massey "utilized the confidential information it had obtained" from petitioners during these negotiations "to take further actions"—including the purchase of a narrow band of coal reserves surrounding the entire Harman Mine—"in order to make the Harman Mine unattractive to others and thereby decrease its value." *Id.* at 494a-95a. Massey then "delayed" consummation of its agreement to purchase the Harman Mine and "ultimately collapsed the transaction in such a manner so

as to increase [petitioners'] financial distress." *Id.* at 494a (internal quotation marks omitted). Left without a purchaser for either their coal or their mining facilities, the corporate petitioners were compelled to cease operations and file for bankruptcy. *Id.* at 495a.

2. In 1998, petitioners filed suit against Massey and several affiliated companies in the Circuit Court of Boone County, West Virginia, to recover damages attributable to Massey's unlawful interference with petitioners' business relations and Massey's fraudulent conduct during its negotiations to purchase the Harman Mine. J.A. 496a.

Mr. Blankenship was the central figure in the trial. Petitioners alleged that Mr. Blankenship had personally directed Massey's unlawful course of conduct in order to force petitioners into bankruptcy (J.A. 63a-65a), and Mr. Blankenship provided extensive testimony at trial about his dealings with petitioners.

After a seven-week trial, the jury returned a verdict in August 2002 that found Massey liable for tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment, and awarded petitioners more than $50 million in compensatory and punitive damages. J.A. 497a.

The trial court denied Massey's post-trial motions challenging the verdict and the size of the damages award, finding that Massey "intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so." J.A. 32a.

3. Immediately after the verdict was announced, Mr. Blankenship publicly vowed that Massey would

appeal the result, which he criticized as "frightening" and bad for "the children of our state." J.A. 115a. Due to the delay generated by Massey's numerous post-trial motions (including its challenge to the accuracy of the trial transcript), Massey did not file a petition for review of the trial court's judgment in the West Virginia Supreme Court of Appeals—the sole appellate court in the State—until October 24, 2006.

In the time between the 2002 verdict and Massey's 2006 petition for review, the composition of the West Virginia Supreme Court of Appeals was altered by lawyer Brent Benjamin's 2004 electoral victory over incumbent Justice Warren McGraw.

Mr. Blankenship played a significant—and very public—role in that election, spending $3 million of his own money to support Justice Benjamin's campaign and actively soliciting additional financial support from other donors. Mr. Blankenship's extraordinary level of support for the Benjamin campaign was unparalleled and virtually unprecedented. Indeed, the $3 million that he expended in support of Justice Benjamin was more than the total amount spent by all other Benjamin supporters combined, three times the amount spent by Justice Benjamin's own campaign committee, and likely more than any other individual spent on a judicial election that year. J.A. 288a; *see also infra* note 4.

Most of Mr. Blankenship's campaign expenditures were made through And For The Sake Of The Kids, a so-called "527 organization" that, according to Mr. Blankenship, was formed after the verdict in this case for the purpose of "beat[ing] Warren McGraw," the incumbent justice against whom Brent Benjamin was running, and that was "named for its belief that McGraw's policies [were] bad for children and their

future." Tom Diana, *W. Va. Coal Executive Works to Oust McGraw*, Wheeling News-Register, Oct. 25, 2004; Brad McElhinny, *Big-Bucks Backer Felt He Had to Try*, Charleston Daily Mail, Oct. 25, 2004, at 1A. By the time of the election, Mr. Blankenship had donated $2,460,500 to And For The Sake Of The Kids—more than two-thirds of the total funds raised by the organization. J.A. 150a.[1]

And For The Sake Of The Kids used most of these funds to finance hundreds of campaign advertisements in the weeks preceding the election, including a series of television ads that accused Justice McGraw of voting to release an incarcerated child molester and to permit him to work in a high school. *See* Deborah Goldberg et al., *The New Politics of Judicial Elections* 4-5 (2004) (describing one of these ads, which stated, "Letting a child rapist go free? To work in our schools? That's radical Supreme Court Justice Warren McGraw. Warren McGraw—too soft on crime. Too dangerous for our kids.").

In addition to the nearly $2.5 million that Mr. Blankenship donated to And For The Sake Of The Kids, he spent another $517,707 of his personal funds on independent expenditures directly supporting the Benjamin campaign, mostly through payments to media outlets for television and newspaper advertisements. J.A. 186a, 200a. Mr. Blankenship also worked to solicit funds on behalf of Justice Benjamin's campaign. Most notably, he widely distrib-

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[1] Nationally, only four political groups directly involved in state elections in 2004 outraised And For The Sake Of The Kids: the Republican Governors Association, the Democratic Governors Association, the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee. Disqual. Mtn. Ex. 17.

uted letters exhorting doctors to donate to the campaign because electing Justice Benjamin would purportedly help to lower their malpractice premiums. *Id.* at 181a.

Mr. Blankenship's significant efforts on behalf of the Benjamin campaign did not go unnoticed. *See, e.g.*, Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, at A1; Toby Coleman, *Coal Companies Provide Big Campaign Bucks*, Charleston Gazette, Oct. 15, 2004, at 1A. Indeed, a number of observers openly questioned the motives behind Mr. Blankenship's extraordinary campaign expenditures at a time when Massey was preparing to appeal a $50 million verdict to the state supreme court. *See, e.g.*, William Kistner, *Justice for Sale*, American RadioWorks (2005), *at* http://americanradioworks.publicradio.org/features/judges/ ("One of [Justice Benjamin's] major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge."); Edward Peeks, Editorial, *How Does Political Cash Help Uninsured?*, Charleston Gazette, Nov. 9, 2004, at 2D ("[T]hese voices raise the question of vote buying to a new high in politics.").

The $3 million that Mr. Blankenship spent to support the Benjamin campaign bore fruit: Justice Benjamin defeated Justice McGraw in the November 2004 election and was sworn in as a justice of the West Virginia Supreme Court of Appeals in January 2005.

4. Before Massey filed its petition in the West Virginia Supreme Court of Appeals seeking review of the $50 million judgment against it, petitioners filed a motion requesting that Justice Benjamin recuse himself from participation in Massey's forthcoming appeal. In accordance with the West Virginia Rules of Appellate Procedure, the motion was directed solely to Justice Benjamin, and his decision was not subject to review by any other member of the court. *See* W. Va. R. App. P. 29.

In their recusal motion, petitioners argued that federal due process required Justice Benjamin to recuse himself from participation in Massey's appeal because Mr. Blankenship's extraordinary support for Justice Benjamin's campaign created a constitutionally unacceptable appearance of bias. J.A. 108a. Massey did not file a response to petitioners' motion to recuse Justice Benjamin (or to either of petitioners' two subsequent recusal motions directed to Justice Benjamin). Indeed, at the same time that petitioners were seeking the recusal of Justice Benjamin, Massey was seeking the recusal of another justice on the West Virginia Supreme Court, Justice Larry Starcher, on the ground that he had made public statements critical of Mr. Blankenship's involvement in the 2004 election. After Justice Starcher initially refused to recuse himself, Massey filed suit against the West Virginia Supreme Court alleging that the court's recusal procedures violate its "rights to the appearance of justice under the Due Process Clause of the Fourteenth Amendment" because the procedures do not provide a means for the full court to review a justice's decision not to recuse himself. Compl. at 5, *Massey Energy Co. v. W. Va. Supreme Court of Appeals*, No. 06-0614 (S.D. W. Va. filed Aug. 8, 2006). That suit remains pending.

In an April 7, 2006, memorandum, Justice Benjamin declined to recuse himself, writing that "no objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case." J.A. 336a-37a.

5. The West Virginia Supreme Court of Appeals thereafter granted Massey's petition for review. In a 3-2 decision, the court reversed the $50 million verdict against Massey and dismissed the case with prejudice—while "mak[ing] perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered" against it. J.A. 357a. Justice Benjamin joined the majority's opinion reversing the verdict against Massey.

Creating nearly a dozen new points of West Virginia law, the majority held that petitioners' suit against Massey was barred by a forum-selection clause in the coal supply agreement that Sovereign Coal Sales, Inc., and Harman Mining Corporation had entered into with Wellmore, which provided that "[a]ll actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia." J.A. 358a. The majority reached this conclusion even though it acknowledged that neither Massey itself nor two of the petitioners—Harman Development Corporation and Mr. Hugh Caperton—were parties to the agreement and that the causes of action on which petitioners prevailed sounded in tort, rather than contract. *Id.* at 377a, 386a-87a.

The majority further held, in the alternative, that petitioners' suit was foreclosed by principles of

res judicata because Sovereign Coal Sales and Harman Mining had obtained a breach-of-contract verdict against Wellmore in a Virginia state court based on Wellmore's improper invocation of the *force majeure* clause in the coal supply agreement. J.A. 411a. In so holding, the majority disregarded the fact that Massey, Harman Development, and Mr. Caperton were not parties to the Virginia action; that the Virginia action involved breach-of-contract, not fraud, claims; that the cases involved vastly different issues and evidence; and that the Virginia action had been on appeal, and was thus nonfinal for res judicata purposes, at the time Massey moved in the trial court to dismiss petitioners' suit on res judicata grounds. *Id.* at 392a, 406a, 407a.

Justices Albright and Starcher filed vigorous dissents. Both expressed alarm at the "result-driven effort" of the majority to relieve Massey of liability. J.A. 423a; *see also id.* at 420a. According to Justice Albright, the majority "went out of its way to make findings that fit its intended result" and did so "by twisting logic, misapplying the law and introducing sweeping 'new law' into our jurisprudence." *Id.* at 429a, 430a-31a (emphasis omitted).

6. Petitioners timely petitioned for rehearing. While that petition was pending, photographs were made public showing Chief Justice Maynard, who had joined the majority's opinion in favor of Massey, vacationing with Mr. Blankenship on the French Riviera during the pendency of Massey's appeal. *See* Paul J. Nyden, *Coal Operator Says Photos Show Maynard Should Not Hear Appeal*, Charleston Gazette, Jan. 15, 2008, at 1A. Petitioners promptly moved for the recusal of Chief Justice Maynard based on his Monte Carlo vacation with Mr. Blankenship. J.A. 432a. Petitioners simultaneously

renewed their request that Justice Benjamin recuse himself based on the appearance of bias generated by Mr. Blankenship's exceptional support for Justice Benjamin's 2004 campaign. *Id.*

Chief Justice Maynard recused himself from further participation in the case. J.A. 447a. Although he professed the ability to be impartial in his consideration of Massey's appeal, he nevertheless concluded that his participation in the case was inappropriate because the "mere appearance of impropriety . . . can compromise the public confidence in the courts." *Id.*

Justice Benjamin, however, again refused to recuse himself (J.A. 445a)—notwithstanding widespread public demands that he step aside from the case in order to restore the perception of an impartial and unbiased judiciary in West Virginia. *See, e.g.*, Editorial, *Bravo*, Charleston Gazette, Feb. 16, 2008, at 4A ("Benjamin remains the only Massey-connected justice still presiding over Massey cases. Clearly, for the sake of impartiality, he should . . . recus[e] himself from all Massey cases.").

Justice Benjamin, as the justice next in line for the court's rotating chief justiceship, selected a state circuit court judge to replace Chief Justice Maynard. The reconstituted court granted petitioners' petition for rehearing and set the case for reargument. J.A. 449a.[2]

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[2] Under established seniority and rotation procedures uniformly followed by the West Virginia Supreme Court of Appeals for twenty-eight years, Justice Albright, not Justice Benjamin, would have been next in line for the court's rotating chief justiceship and would have appointed a replacement for Chief Justice Maynard. *See* J.A. 457a (Starcher, J., recusing); Paul J. Nyden, *Albright Passed over for Chief Justice*, Charleston Ga-

Shortly thereafter, Justice Starcher recused himself from further participation in the case due to the perception created by his public statements criticizing Mr. Blankenship's role in Justice Benjamin's campaign. J.A. 462a. In his recusal order, Justice Starcher urged Justice Benjamin also to step aside from the case, asserting that Mr. Blankenship's extraordinary campaign expenditures gave rise to "the very definition of 'appearance of impropriety'" and "have far more egregiously tainted the perceived impartiality of this Court than any statement" he had made about Mr. Blankenship. *Id.* at 456a, 460a.

To substantiate Justice Starcher's observations, petitioners submitted a third recusal motion to Justice Benjamin accompanied by poll results indicating that 67% of West Virginians doubted his ability to be fair and impartial in deciding Massey's appeal. J.A. 467a. Justice Benjamin nevertheless again refused to recuse himself, declaring that the results were "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." *Id.* at 483a.

[Footnote continued from previous page]

zette, Nov. 23, 2007, at 1A. Justice Benjamin secured this authority, however, when Chief Justice Maynard, Justice Davis, and Justice Benjamin—the three justices who formed the majority in the first opinion in favor of Massey—voted to disregard those long-standing procedures and to move Justice Benjamin ahead of Justice Albright in the order of succession to the chief justiceship. *Id.*; *see also* J.A. 457a (Starcher, J., recusing) (Chief Justice Maynard "recently voted to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship's companies").

That same day, the West Virginia Supreme Court of Appeals—which now included two circuit court judges appointed by Justice Benjamin to replace Chief Justice Maynard and Justice Starcher—issued its opinion on rehearing, and again reversed the judgment against Massey by a 3-2 vote. J.A. 485a. Justice Benjamin joined the majority opinion, which relied on the same legally dubious forum-selection and res judicata grounds as the court's earlier decision in favor of Massey.

Justice Albright, now joined by Circuit Judge Cookman, strenuously dissented, contending that "the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions." J.A. 633a. The dissenting opinion meticulously critiqued the factual findings and new points of law fashioned "to achieve the result desired by the majority." *Id.* at 583a.

In addition to their disagreement with the majority's forum-selection and res judicata analyses, the dissenters also explained that they were "unable to stand silent" regarding Justice Benjamin's failure to recuse himself. J.A. 633a n.16 (Albright, J., dissenting). "Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955)," the dissenters wrote, "it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." J.A. 633a n.16 (Albright, J., dissenting). "It is now clear, especially from the last motion for disqualification filed in this case," they continued, "that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed." *Id.*

7. Four months after the West Virginia Supreme Court of Appeals' decision on rehearing—and nearly a month after the petition for a writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion that provided a lengthy explanation for his decision not to recuse himself from Massey's appeal. J.A. 635a. Justice Benjamin insisted that his "participation herein was wholly consistent with due process" because petitioners had not "claim[ed] any *actual* bias or prejudice on [his] part." *Id.* at 654a-55a, 657a (emphasis added). Justice Benjamin maintained that "appearances"—even the overwhelming appearance of bias generated by a CEO's expenditure of $3 million to support the campaign of a judge deciding his company's appeal—"should never alone serve as the basis for a due process challenge" to a judge's participation in a case. *Id.* at 657a n.14. Indeed, in Justice Benjamin's view, the "very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process" and would have a "long-lasting negative effect on public confidence in our courts." *Id.* at 655a n.12, 663a.

SUMMARY OF ARGUMENT

Justice Benjamin was constitutionally required to recuse himself from this case because Mr. Blankenship's extraordinary support for his election campaign created an objective probability that he was biased in favor of Massey and against petitioners.

A. In order to safeguard the constitutional right to an impartial judge, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). To that end, this Court has repeatedly held that due process requires recusal not only where there is proof

that a judge is actually biased, but also where an objective inquiry establishes a probability of bias on a judge's part. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

This objective recusal standard is required to ensure that litigants receive a "fair trial in a fair tribunal" (*Murchison*, 349 U.S. at 136) because, in most cases, it is extraordinarily difficult to prove that a judge harbors a subjective bias against a litigant. Judges are highly unlikely to acknowledge that they are biased, and discovery is almost always unavailable to substantiate the existence of judicial bias. A standard that tolerated adjudication by any judge who has not been conclusively proven to be partial would relegate parties to trial before judges with a strongly suspected, yet unprovable, bias and would profoundly undermine public confidence in the integrity and legitimacy of the judicial branch.

B. It is not the case that recusal is constitutionally required whenever a judge receives campaign support from a litigant or attorney—especially where that support represents only a small fraction of the total support for the judge's campaign. In this case, however, there are at least five reasons that Mr. Blankenship's campaign support generated a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey and against petitioners.

When viewed together, the facts surrounding Mr. Blankenship's underwriting of Justice Benjamin's campaign—the staggering amount of money that Mr. Blankenship expended, the fact that Mr. Blankenship's expenditures represented more than

half of the total financial support for Justice Benjamin, Mr. Blankenship's additional fundraising efforts on the campaign's behalf, his provision of this support while preparing this multimillion-dollar appeal to the state supreme court, and the fact that Justice Benjamin's participation in this case was not subject to review by any other justice—created an overwhelming probability of bias that required Justice Benjamin to recuse himself.

C. None of Justice Benjamin's reasons for refusing to recuse himself from this case is constitutionally sufficient.

Although Justice Benjamin emphasized that he has voted against Massey's interests in other cases, he failed to identify any case in which he has cast an outcome-determinative vote against Massey. And the fact that Mr. Blankenship is the chairman, CEO, and president of Massey—rather than a named party—is similarly irrelevant. Mr. Blankenship is a substantial stockholder in Massey who personally directed Massey's unlawful conduct against petitioners. He therefore has a strong personal and professional interest in the outcome of this case—which created a compelling reason for Justice Benjamin to repay his debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey's favor.

The likelihood that Justice Benjamin harbored, and sought to repay, that debt of gratitude in this case is not diminished by Mr. Blankenship's use of independent expenditures, rather than direct contributions, to furnish his financial support. The end result was the same: Mr. Blankenship's expenditures were directly responsible for hundreds of pro-Benjamin and anti-McGraw campaign advertisements that unquestionably helped Justice Benja-

min—a previously unknown and underfunded candidate—prevail in his sharply contested race. It would only be natural for Justice Benjamin to feel indebted to Mr. Blankenship for these extraordinary efforts on his behalf.

Justice Benjamin's decision not to recuse himself should be reversed.

ARGUMENT

Justice Benjamin refused to recuse himself from Massey's appeal because he found that petitioners had not proven "any actual bias" on his part. J.A. 654a. Justice Benjamin's self-serving conclusion that due process requires recusal *only* where there is definitive proof of a judge's actual bias against a party is inconsistent with this Court's well-settled precedent, which establishes that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the *appearance* of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added). Where, as here, the "appearance of bias" is serious enough to create a "probability" that the judge is actually biased against a litigant, due process requires the judge's recusal. *In re Murchison*, 349 U.S. 133, 136 (1955); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

DUE PROCESS REQUIRED JUSTICE BENJAMIN TO RECUSE HIMSELF FROM THE APPEAL OF HIS PRINCIPAL FINANCIAL SUPPORTER.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136. A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Justice Benjamin's participation in this appeal denied petitioners this fundamental due process right.

A. Due Process Requires The Recusal Of A Judge Who Is Actually Biased Or Tainted By A Probability Of Bias.

Justice Benjamin's primary basis for refusing to recuse himself from this case was his contention that due process requires the recusal of a judge only where there is definitive proof of "actual bias" on his part. J.A. 654a; *see also id.* at 336a-37a ("no objective information is advanced to show that this Justice has a bias for or against any litigant"). This was error.

1. It is a basic principle of due process that a judge may not participate in a case where he is actually biased against one of the parties. *Murchison*, 349 U.S. at 136. It is equally well-established that "our system of law has always endeavored to prevent even the *probability* of unfairness." *Id.* (emphasis added). This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in

the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted).

In light of the importance of preserving the "appearance of justice," this Court has repeatedly held that, where an objective inquiry establishes a "probability" of bias on a judge's part, the judge is constitutionally barred from participating in a case even if there is insufficient evidence to establish that the judge is subjectively biased against a party. *Murchison*, 349 U.S. at 136; *Withrow*, 421 U.S. at 47.

In *Tumey v. Ohio*, 273 U.S. 510 (1927), for example, the Court held that it violated due process for a village mayor to preside over a criminal proceeding where the mayor was only paid for his services if the defendant was convicted and where the village received a share of any fine that was levied against the defendant. *Id.* at 535. The Court acknowledged that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.* at 532. "[B]ut the requirement of due process of law in judicial procedure," the Court continued, "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Whether or not the mayor was actually biased against the defendant, due process prohibited him from presiding over the case because "[e]very procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might* lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* (emphases added); *see also North v. Russell*, 427 U.S. 328, 337 (1976) (in *Tumey*, "[f]inancial interest in the fines was thought to risk a *possible* bias in finding guilt

and fixing the amount of fines, and the Court found that *potential* for bias impermissible") (emphases added).

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of proof of actual bias on the judge's part, the Court concluded that recusal was constitutionally required because "[n]o one so cruelly slandered is *likely* to maintain that calm detachment necessary for fair adjudication." *Id.* at 465 (emphasis added).[3]

This constitutional prohibition upon adjudication by judges tainted by a probability of bias applies with equal force in the civil setting. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that it violated due process for a state supreme court justice to participate in the court's review of a verdict for bad-faith refusal to pay an insurance claim because the justice was pursuing his own bad-faith suit against an insurance company and the supreme court's decision could have had a direct impact on the outcome of the justice's case. *Id.*

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[3] *See also Withrow*, 421 U.S. at 47 ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him"); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (due process barred a judge who had become embroiled in a running dispute with a contumacious attorney from presiding over a contempt hearing because "there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused") (internal quotation marks omitted).

at 825. The Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Justice Embry's ongoing pursuit of monetary damages through a cause of action identical to the one pending before the state supreme court offered just such a "temptation."

2. The due process prohibition upon adjudication by judges tainted by a probability of bias is essential to ensuring that all litigants receive their fundamental right to a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136.

It is often exceptionally difficult—if not wholly impossible—to present conclusive proof that a judge is subjectively biased. Indeed, it is extraordinarily rare for a judge to acknowledge that he harbors a bias against a litigant. *See Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias . . . might exist in the mind of one . . . who was quite positive that he had no bias"). And it is nearly equally rare for litigants to be afforded the opportunity for discovery to obtain evidence of a judge's bias because the availability of discovery generally rests in the "sound discretion" of the judge whose impartiality is being challenged. *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997).

As in this case, then, most recusal motions must rely solely on the publicly available facts about a judge. In light of this evidentiary hurdle, the right of litigants to a fair trial before an unbiased judge can only be vindicated by mandating recusal where these

publicly available facts create an objective "probability of actual bias on the part of the judge." *Withrow*, 421 U.S. at 47; *see also Murchison*, 349 U.S. at 136. A requirement that a litigant seeking a judge's recusal conclusively establish the existence of judicial bias would eviscerate the procedural protections afforded by due process and relegate parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them.

For this reason, the Court has repeatedly recognized that, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial bias creates a constitutionally unacceptable risk of *actual* bias. *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality op. of Marshall, J.); *see also Tumey*, 273 U.S. at 532; *Lavoie*, 475 U.S. at 825. In *Lavoie*, for example, the Court held that Justice Embry's recusal was constitutionally required—despite the absence of proof of actual bias—because his pending suit against another insurance company created the probability that he was biased against Aetna. *Id.*

For similar reasons, federal law and state judicial codes generally mandate recusal where a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also* ABA Model Code of Judicial Conduct R. 2.11(A) (2007) (same). Although these standards are more stringent than the constitutional floor established by the Due Process Clause—they require recusal whenever there is a "reasonabl[e]," objective basis for questioning a judge's impartiality (*see Liteky v. United States*, 510 U.S. 540, 548 (1994)), while due process mandates recusal only when the appearance of partiality is serious enough to generate an objective "probability of actual bias"

(*Withrow*, 421 U.S. at 47)—both the nonconstitutional and due process recusal standards are animated by the same concern about possible judicial bias.

The implications of permitting a judge to participate in a case while tainted by a probability of bias transcend the constitutional rights of the litigants in that particular case. It is axiomatic that the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Tolerating the participation of a judge who is likely to harbor a bias against a litigant would do irreparable harm to the public's confidence in the judicial system. *See N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges."). Neither the litigant relegated to the tainted judicial proceeding nor the public evaluating the result of that proceeding is likely to take much solace from the fact that, despite the overwhelming appearance of bias, there was no definitive proof of actual bias. The legitimacy of the judicial branch—just as much as the constitutional rights of individual litigants—depends upon preserving the appearance of impartiality in judicial proceedings.

3. These constitutional principles are well-established and have been regularly reaffirmed. *See, e.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (due process "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against

him"). It is therefore not surprising that Massey itself has repeatedly acknowledged—in this litigation and closely related litigation—that due process prohibits the participation of a judge who is tainted by a probability of bias.

When Massey sought the recusal of Justice Starcher in this case based on his public criticism of Mr. Blankenship, it did so on the ground that "Justice Starcher by his very public and derogatory comments has created an appearance of partiality." Motion for Disqualification of Justice Starcher at 8; *see also id.* at 8-9 ("avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself") (internal quotation marks omitted). Moreover, in its ongoing § 1983 action against the West Virginia Supreme Court of Appeals, Massey has argued that Rule 29 of the West Virginia Rules of Appellate Procedure "violates [its] rights to the appearance of justice under the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as the rule . . . permits a justice of the West Virginia Supreme Court who is the subject of a disqualification motion exclusively to determine the merits of that motion." Compl. at 5-6, *Massey Energy Co.*, No. 06-0614; *see also* Mem. in Support of Plaintiffs' Motion for Summary Judgment at 15, *Massey Energy Co.*, No. 06-0614 ("Rule 29 also violates the Due Process Clause because it undermines the court's obligation to render the appearance of justice.").

Massey's suggestion in this Court that due process requires recusal only "where the judge harbors some form of substantial actual bias" (Br. in Opp. 15) represents an abrupt about-face from the position it unambiguously staked both earlier in this litigation and in its related § 1983 suit. Massey's conveniently

timed reformulation of its views might have been necessary to facilitate its defense of Justice Benjamin, but Massey's artificially narrow understanding of due process cannot be reconciled with its own previous statements on the issue or with this Court's profound concern for "prevent[ing] even the probability of unfairness" in judicial proceedings. *Murchison*, 349 U.S. at 136.

B. Mr. Blankenship's Campaign Support For Justice Benjamin Created A Constitutionally Unacceptable Probability Of Bias.

Mr. Blankenship's prodigious efforts on behalf of Justice Benjamin's campaign, all undertaken while he prepared to appeal this case to the state supreme court, generated an overwhelming probability that Justice Benjamin was biased in favor of Mr. Blankenship's company and against petitioners in this case. Justice Benjamin's insistence on nevertheless participating in his principal financial supporter's appeal violated due process.

1. Judicial elections are a well-established and constitutionally permissible means of selecting state court judges, and it is certainly not the case that due process requires a judge to recuse himself every time a litigant or attorney contributed to or otherwise supported the judge's election campaign. This is particularly true where the contribution represents only a small fraction of the overall financial support for a judge's campaign. Absent other evidence, no reasonable observer would conclude that such modest campaign support creates a probability that the judge is biased in favor of the supporter.

But it is just as surely not the case that campaign support from a litigant or attorney is *never* suf-

ficient to compromise a judge's impartiality and to require recusal. Maintaining the unassailable neutrality of judicial decision-making is exceptionally—and uniquely—important to the judicial branch because the public's "respect for judgments depends . . . upon the issuing court's absolute probity." *Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Neutral decision-making does not carry the same importance to either of the political branches of government. Indeed, while this Court has recognized a compelling government interest in extirpating actual corrupt *quid pro quo* transactions, and the appearance of such transactions, from the political branches (*Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam)), politicians are under no obligation to maintain neutrality in their official acts and remain free to give preferential access and consideration to their campaign supporters. In contrast, due process *absolutely* prohibits a judge from according preferential treatment to any litigant appearing before him. *See White*, 536 U.S. at 776 (due process "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party"). Accordingly, if a litigant's or attorney's campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge's recusal. *See Murchison*, 349 U.S. at 136; *Withrow*, 421 U.S. at 47.

For at least five reasons, any reasonable observer would conclude that Mr. Blankenship's support for Justice Benjamin's campaign generated a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey in this case.

First, the sheer volume of Mr. Blankenship's financial support for Justice Benjamin's campaign is

truly staggering. West Virginia law imposes a $1,000 limit on contributions to judicial campaigns. W. Va. Code § 3-8-12(f). Through his donations to And For The Sake Of The Kids and direct expenditures on campaign advertising, Mr. Blankenship spent *3,000 times* that amount supporting Justice Benjamin. The $3 million that Mr. Blankenship spent is three times the amount spent by Justice Benjamin's own campaign committee (J.A. 288a) and $1 million more than the *total* amount spent by Justice Benjamin's committee and the committee of his opponent, Justice Warren McGraw. *See* Goldberg, *supra*, at 16. Indeed, the $2.5 million that Mr. Blankenship spent to fund And For The Sake Of The Kids' campaign to elect Justice Benjamin is more than any other individual or group contributed to a 527 organization involved in *any* 2004 judicial election campaign. *See* Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races* 5 (2005). The next largest donor gave $600,000 less than Mr. Blankenship. *Id.*

Second, the appearance of bias generated by the size of Mr. Blankenship's campaign expenditures is reinforced by the fact that his expenditures represent 60% of the *total* amount spent to support Justice Benjamin's campaign.[4] Thus, this is not a case where the expenditures in question—even though large in absolute terms—were matched by equally large donations from other parties that could con-

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[4] A total of $4,986,711 was spent supporting Justice Benjamin's 2004 campaign: $3,623,500 by And For The Sake Of The Kids (Disqual. Mtn. Ex. 17), $845,504 by the Benjamin for Supreme Court Committee (J.A. 288a), and $517,707 by Mr. Blankenship through direct expenditures (*id.* at 186a, 200a).

ceivably have diminished the probability of judicial bias in favor of one specific donor.

Third, Mr. Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf. Most notably, he distributed letters urging doctors to "send $1000 to Brent Benjamin" because "[i]f Warren McGraw gets re-elected to the West Virginia Supreme Court your insurance rates will almost certainly be higher for the next twelve years than they will be if Brent Benjamin gets elected." J.A. 181a. Mr. Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

Fourth, the timing of Mr. Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal. Mr. Blankenship's campaign expenditures and fundraising efforts were made between August 2004 and November 2004 (J.A. 119a, 199a), when Mr. Blankenship was preparing to appeal this personally and professionally significant case to the court on which Justice Benjamin was seeking a seat. Indeed, after the jury returned its verdict against Massey in August 2002, Mr. Blankenship immediately made a public vow to appeal the verdict to that court. *Id.* at 115a. Although the appeal was delayed by Massey's post-trial motions, there was no doubt during the 2004 campaign that the case would ultimately be decided by the state supreme court and that, if elected, Justice Benjamin would have the opportunity to cast a vote in that appeal.

Fifth, Justice Benjamin's decision to participate in Massey's appeal was not subject to review by the

other members of his court. Where a judge's decision not to recuse himself is endorsed by the court's other members, the likelihood of judicial bias may be diminished because the allegations of bias have been examined—and rejected—by the judge's colleagues. In this case, not only were the other justices of the West Virginia Supreme Court of Appeals precluded by state law from considering petitioners' recusal motions, but three members of the court (two justices and a circuit judge appointed to replace one of the recused justices) expressed strong concerns about Justice Benjamin's participation in the case. *See* J.A. 633a n.16 (Albright, J., joined by Cookman, J., dissenting); *id.* at 462a (Starcher, J., recusing). His colleagues' discomfort with Justice Benjamin's refusal to recuse himself underscores the strong probability of bias generated by Mr. Blankenship's support for Justice Benjamin's campaign.

2. The probability that Justice Benjamin was biased in favor of Massey and against petitioners is at least as strong as the probability of bias in *Tumey*, *Mayberry*, and *Lavoie*.

Just as it is human nature for a judge to be biased *against* a criminal defendant whose conviction would benefit the judge financially or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party whose CEO facilitated his election through massive campaign expenditures that were larger than the combined amount spent by all of the judge's other supporters. Justice Benjamin won his seat on the West Virginia Supreme Court by a narrow 53-to-47-percent margin over Justice McGraw to become the first non-incumbent Republican to secure a seat on that court since the 1920s. *See* Juliet A. Terry, *Courting Change: Benjamin Hopes to Shine Light on*

Justice, State J. (W. Va.), Nov. 4, 2004, at 4; Lawrence Messina, *Benjamin Unseats McGraw After "Vicious," Pricey Court Race*, Associated Press State & Local Wire, Nov. 3, 2004. There can be little doubt that the extensive advertising that Mr. Blankenship funded through his direct expenditures and his contributions to And For The Sake Of The Kids immensely improved Justice Benjamin's electoral prospects in this closely contested race. It would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship for his extraordinary efforts on the campaign's behalf. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge is tainted by a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising identical legal issues, such a "temptation" is equally acute where the judge is beholden to a corporation's CEO for the majority of the funds spent in support of his recent campaign—and where casting an outcome-determinative vote against the corporation in a multimillion-dollar case may foreclose the possibility of similar financial support when the judge seeks reelection.

In light of the overwhelming probability that Justice Benjamin was biased in favor of Massey and against petitioners, due process required Justice Benjamin to step aside from consideration of Massey's appeal.

C. Justice Benjamin's Reasons For Refusing To Recuse Himself Are Constitutionally Inadequate.

Although Justice Benjamin's primary ground for refusing to recuse himself was his erroneous assertion that due process requires recusal only where there is proof of "actual bias" (J.A. 654a), he also attempted to dispel the appearance of bias created by Mr. Blankenship's extraordinary level of campaign support. None of Justice Benjamin's rationalizations is constitutionally sufficient, however, to excuse his participation in this case.

Justice Benjamin observed, for example, that he has voted against Massey's interests in other cases. J.A. 674a n.29. But Justice Benjamin points to no case—and we are aware of none—in which he has cast an outcome-determinative vote against Massey.[5] In any event, the fact that a judge might not vote in favor of a particular litigant in *every* case hardly means that he does not harbor a bias in favor of that litigant in *any* case. *Cf. Bracy v. Gramley*, 520 U.S. 899, 901 (1997) (authorizing discovery into whether a judge who regularly took bribes from criminal defendants had issued rulings intended to facilitate the conviction of a defendant who had not bribed him in order "to deflect suspicion that he was taking bribes

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[5] *See* J.A. 674a n.29 (Benjamin, J., concurring) (citing *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005) (concurring in part and dissenting in part from an opinion against Massey that was joined in full by three of the court's five justices); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (concurring in an opinion against Massey that was joined by three other justices); *Massey Energy v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008) (voting with the court's four other justices to deny Massey's petition for appeal)).

in other cases"). A judge tainted by a probability of bias cannot constitutionally immunize his actions by the simple expedient of failing invariably to vote in the manner suggested by that bias.

Justice Benjamin also suggested that the appearance of bias created by Mr. Blankenship's campaign support is minimized by the fact that Mr. Blankenship is "an employee of a party in this case" and not a party himself. J.A. 681a. But Mr. Blankenship is far more than a mere employee of Massey: He is the central figure in this litigation.

Mr. Blankenship is not only the chairman, CEO, and president of Massey, but he also holds more than 250,000 shares of the company's stock. *See* Massey Energy, News Release, *Massey CEO Exercises Options Within Limited Trading Window and to Diversify Assets* (Feb. 8, 2008). Mr. Blankenship's business reputation and personal finances therefore depend to a significant extent upon Massey's financial well-being, which was materially weakened by the $50 million verdict in this case. Moreover, Mr. Blankenship personally directed the business decisions that gave rise to petitioners' fraud claims (J.A. 63a-65a), and he provided extensive testimony at trial about his business dealings with petitioners. *Id.* at 89a. The jury evidently found Mr. Blankenship to lack credibility because it rejected his version of events when it returned the fraud verdict against Massey. Mr. Blankenship therefore had a powerful personal and professional interest in securing the reversal of the jury's verdict, and Justice Benjamin had an equally powerful reason to repay his debt of gratitude to Mr. Blankenship by casting

the outcome-determinative vote in Massey's favor in this important case.[6]

Justice Benjamin also asserted that his "campaign was completely independent of any independent expenditure group," including And For The Sake Of The Kids. J.A. 673a. But there is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because a majority of his financial support was provided through And For The Sake Of The Kids—an organization formed for the express purpose of defeating Justice McGraw and electing Justice Benjamin—rather than directly to Justice Benjamin's campaign committee. *Cf. FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2672 (2007) (opinion of Roberts, C.J.) ("in some circumstances, large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions") (internal quotation marks omitted).

The end result was the same: Justice Benjamin benefited from extensive advertising criticizing his sole opponent for office and highlighting Justice Benjamin's qualifications. While Justice Benjamin con-

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[6] The extent to which a bias for or against Mr. Blankenship can translate into a bias for or against Massey is underscored by Massey's repeated efforts in this case and other litigation to obtain the recusal of Justice Starcher based on his public criticism of Mr. Blankenship. *See* Motion for Disqualification of Justice Starcher at 6 ("Can there truly be an honest debate whether a justice who has called a key witness in a case and the CEO of one of the defendants 'stupid' and 'a clown' should sit on the case?"); *see also Cent. W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp.*, No. 08-218 (cert. denied Dec. 1, 2008) (petition by Massey and affiliated company arguing that Justice Starcher violated due process by failing to recuse himself from a Massey case after publicly criticizing Mr. Blankenship).

tends that his victory over Justice McGraw was principally attributable to his campaign message and Justice McGraw's errors on the campaign trail (J.A. 673a-74a), it strains credulity to suggest that the $3 million in financial support provided by Mr. Blankenship—to say nothing of his other campaign efforts on Justice Benjamin's behalf—did not have a meaningful role in disseminating Justice Benjamin's message or highlighting Justice McGraw's perceived flaws. Any reasonable observer would conclude that a justice who had benefited to such a significant extent from a litigant's campaign expenditures would feel indebted to that litigant for his support.

* * *

According to Justice Benjamin, the "long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable." J.A. 663a. In fact, it is Justice Benjamin's participation in his principal financial supporter's $50 million appeal that could have an "incalculable" and "long-lasting negative effect" on West Virginia's judicial system.

As this case vividly illustrates, the increasing prevalence of massive campaign expenditures in state judicial elections has had a corrosive effect on the public's confidence in the integrity of state courts. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) (citing survey data "indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions"). Justice Benjamin's constricted understanding of due process—which holds that litigants' campaign expenditures can *never* create a probability of bias sufficient to mandate recusal—would hasten the loss of public

confidence in the judiciary and irretrievably weaken the courts' "reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407.[7]

Although not every campaign contribution or expenditure by a litigant or attorney creates a probability of bias that requires a judge's recusal, there are exceptional cases where recusal is constitutionally required—both to ensure the litigants' right to a fair trial and to safeguard public confidence in the judicial system. This is such a case.

CONCLUSION

For the foregoing reasons, Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

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[7] *See, e.g.*, Editorial, *Finally*, Register Herald (Beckley, W. Va.), Feb. 18, 2008 ("Benjamin clearly was aided by Blankenship's multi-million dollar campaign against incumbent Warren McGraw and even[ ] though the justice has stated unequivocally he isn't influenced by Blankenship, it just doesn't look good."); Allan N. Karlin & John Cooper, Editorial, *Perception That Justice Can Be Bought Harms the Judiciary*, Sunday Gazette Mail (Charleston), Mar. 2, 2008, at 3C ("It is time to say publicly what attorneys across the state are saying privately: Justice Brent Benjamin needs to . . . step down from hearing cases involving Massey Energy and its subsidiaries. His continued involvement in Massey litigation endangers the public perception of the integrity of the Supreme Court of Appeals.").

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

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RESPONDENT'S BRIEF

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No. 08-22

In the Supreme Court of the United States

HUGH M. CAPERTON ET AL.

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

BRIEF FOR RESPONDENTS

EVAN M. TAGER
DAN HIMMELFARB
JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 262-1910

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 825-2335

Counsel for Respondents
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

LEWIS F. POWELL III
RYAN A. SHORES
ROBERT W. LOFTIN
Hunton & Williams LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

D.C. OFFUTT, JR.
Offutt Nord, PLLC
P.O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

QUESTION PRESENTED

Petitioners sought the recusal of Justice Brent Benjamin of the West Virginia Supreme Court of Appeals on the ground that Don Blankenship, an officer of respondent A.T. Massey Coal Company and its parent (Massey Energy Company), had made large independent expenditures in an effort to defeat Justice Benjamin's opponent in an election several years before this case was decided. Apart from a $1,000 contribution by A.T. Massey's Political Action Committee, neither respondents nor Massey Energy made any expenditures in support of Justice Benjamin's election or in opposition to his opponent; Blankenship's only direct contribution to Justice Benjamin's campaign totaled $1,000; and Justice Benjamin has voted against Massey affiliates in at least five other cases, including one in which the judgment against Massey was almost five times that here.

The question presented is whether the Due Process Clause of the Fourteenth Amendment required Justice Benjamin's disqualification on the theory that he must have felt a "debt of gratitude" to Blankenship that created a "probability of bias" in favor of respondents.

RULE 29.6 STATEMENT

Respondent A.T. Massey Coal Company, Inc. is wholly owned by Massey Energy Company, which is publicly traded. Massey Energy Company has no parent corporation; BlackRock Advisors, LLC owns 10% or more of its stock. Respondents Massey Coal Sales Company, Inc. and Elk Run Coal Company, Inc. are wholly owned by A.T. Massey Coal Company, Inc. Respondents Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. are wholly owned by Elk Run Coal Company, Inc.

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BRIEF FOR RESPONDENTS

During the 2004 campaign for a seat on West Virginia's highest court, Don Blankenship, the CEO of Massey Energy Company, was actively engaged in the effort to defeat the incumbent, Justice Warren McGraw. Blankenship spent approximately $3 million of his own money in support of that effort, all but $1,000 of which was expended independently of the campaign of Justice McGraw's opponent, Brent Benjamin. Benjamin ultimately won the election.

Petitioners requested Justice Benjamin's recusal in this case because Massey subsidiaries (respondents here) are parties. Petitioners argued that Blankenship's independent expenditures in opposition to Justice McGraw's reelection created an "appearance" that Justice Benjamin was biased in favor of the Massey defendants. Justice Benjamin denied the request, reasoning in part that an "appearance of bias" is not constitutionally disqualifying. In their petition for certiorari, petitioners contended that the question whether an "appearance of bias" is constitutionally disqualifying was one of broad general importance.

Petitioners have now abandoned the "appearance" theory. In their merits brief, they contend that Blankenship's expenditures required recusal under the Constitution because they created a "probability" that Justice Benjamin was "actually biased" in favor of the Massey subsidiaries—a standard petitioners acknowledge is different from the "appearance" standard they previously advocated. Petitioners should not be permitted to induce the Court to grant certiorari on one theory, only to ask it to adopt a different theory after review has been granted. The writ

should be dismissed as improvidently granted. Otherwise, the decision below should be affirmed, because petitioners are not entitled to relief even under their new theory.

This Court has never held that a judge's disqualification is required by the Fourteenth Amendment—as opposed to recusal statutes or canons of judicial conduct—for "bias" in general, let alone for a "probability of bias." The Court has found disqualification constitutionally required only when—unlike here—the judge had a pecuniary interest in the outcome of the case, or in certain situations arising in contempt proceedings, where special rules apply.

Even if "probability of bias" were the constitutional standard, that standard could not be satisfied merely because, as petitioners contend, the judge might feel a "debt of gratitude" to a litigant. Such a theory is only loosely linked to probable bias, would have no limiting principle, would be entirely unworkable, and would create serious administrative problems for courts.

Finally, even if a "debt of gratitude" could give rise to a constitutionally disqualifying "probability of bias," the presumption that Justice Benjamin acted impartially cannot be overcome, and thus disqualification would not be required here. The expenditures at issue were not solicited by Benjamin and, except for a $1,000 contribution to his campaign, were made entirely independently; there is no evidence of any past or present friendship or other relationship between the two men; Blankenship is not a party to this case; and Justice Benjamin has voted against Massey affiliates in at least five other cases, including one involving a $243 million judgment against the company. Unless "probably" means no more

than "possibly," Justice Benjamin was not "probably biased" in respondents' favor.

STATEMENT

A. The 2004 Election

1. The citizens of West Virginia, like those of 38 other States, select their judges by popular vote. In 2004, Brent Benjamin challenged the incumbent, Justice Warren McGraw, for a seat on the West Virginia Supreme Court of Appeals. Don Blankenship, the CEO of Massey Energy and its subsidiary A.T. Massey Coal, disapproved of Justice McGraw's jurisprudence. He believed Justice McGraw's decisions harmed West Virginia's economy, depressed wages, and drove up "insurance costs for the working man." Tom Diana, *W. Va. Coal Executive Works to Oust McGraw*, THE INTELLIGENCER, 10/25/04. He also believed that the "most important donation [he] could make to [his] fellow West Virginians was to help defeat Warren McGraw," because, in his view, Justice McGraw was not "for the working man" but rather was "for the trial lawyers." Brad McElhinny, *Massey chief pours $1.7 million into race*, CHARLESTON DAILY MAIL, 10/15/04, at 1A. Blankenship's views about Justice McGraw caused him to become actively involved in the 2004 election; he did not and does not have any friendship or other personal connection with Benjamin, and his support was not solicited by him.

Blankenship spent approximately $500,000 on literature and advertising to convince the electorate that Justice McGraw was not the right person for the job. JA187a-200a, 301a-313a. In accordance with West Virginia law, Blankenship conducted those ac-

tivities "without the cooperation or consent" of the Benjamin campaign. JA187a.

Blankenship also made significant contributions to And for the Sake of the Kids (ASK), an organization established under 26 U.S.C. § 527(e). ASK ran ads and held events opposing Justice McGraw's reelection. JA117a-141a. Blankenship gave approximately $2.5 million to ASK, while others gave a total of more than $1 million; an organization representing physicians, Doctors for Justice, contributed $750,000. JA127a.

Other 527 groups also opposed Justice McGraw. Citizens for Quality Health Care, funded in part by the West Virginia Chamber of Commerce, spent nearly $370,000 on anti-McGraw advertisements. See Paul Nyden, *Coal, doctors' groups donated to anti-McGraw effort*, CHARLESTON GAZETTE, 1/7/05, at 5A. Citizens Against Lawsuit Abuse also ran critical ads. See Juliet Terry, *Benjamin Hopes to Shine Light on Justice*, STATE J., 11/5/04, at 4.

Blankenship contributed only $1,000 directly to Benjamin's campaign. JA208a. Apart from a $1,000 contribution by A.T. Massey Coal Company's PAC (JA242a), neither Massey nor any of its subsidiaries contributed money to Benjamin's campaign, provided any funding to ASK, or made any other independent expenditures.

Millions of dollars were also spent opposing Benjamin. One opponent, a 527 group called West Virginia Consumers for Justice, received approximately $2 million in contributions, including approximately $1.5 million from members of the plaintiffs' bar, as well as $10,000 from petitioner Caperton and $15,000 from a law firm that represents petitioners

here (Buchanan Ingersoll). See John O'Brien, *Caperton was anti-Benjamin from the start*, W. VA. RECORD, 1/24/08.

2. Concern that West Virginia courts had become "unfair and unpredictable" was a central plank in Benjamin's campaign. Mannix Porterfield, *Benjamin faults McGraw's "extreme judging,"* REGISTER-HERALD, 10/21/04. Benjamin welcomed the support of those who wanted a judge who "would follow the law" but warned that "if you want something in return, I'm not your candidate." JA319a.[1] On Labor Day 2004, Justice McGraw delivered a widely discussed speech in which he made a number of bizarre claims, including that this Court had "approved gay marriage." JA678a-679a & nn.35-38. Shortly before the election, Benjamin received the endorsement of all but one of the West Virginia daily newspapers to offer endorsements. JA674a n.27. Benjamin ultimately won the election.

On January 1, 2005, Justice Benjamin began his 12-year term. In his first few years on the court, he often voted against Massey companies, at both the merits stage (see *U.S. Steel Mining Co.* v. *Helton*,

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[1] It has been insinuated that Blankenship expended these large sums for the purpose of influencing the outcome of this case. In this regard, petitioners emphasize throughout their brief that this case meant a lot to Blankenship because he had a financial stake in the outcome. The insinuation is nothing more than rank speculation—and is implausible to boot. Blankenship owns only 0.35% of Massey's stock (see *infra* p. 53-54), so that his personal stake in the judgment (at most $175,000) was a small fraction of the money he expended. Moreover, the 2004 election was not unique; Blankenship has made expenditures to espouse his favored causes in West Virginia elections on issues entirely unrelated to Massey's business. See *infra* p. 6.

631 S.E.2d 559 (W. Va. 2005); *Helton* v. *Reed*, 638 S.E.2d 160 (W. Va. 2006)), and the petition stage (see *McNeely* v. *Independence Coal Co.*, No. 042156 (W. Va. Feb. 9, 2005); *Brown* v. *Rawl Sales & Processing* Co., No. 070889 (W. Va. Sept. 11, 2007)).

Blankenship—who has lived in the State for most of his life—has continued to participate actively in West Virginia elections when issues important to him are at stake. For example, he spent millions of dollars of his own money to unseat candidates who opposed the abolition of a sales tax on food and to defeat a bond referendum. See Juliet Terry, *Feeling Blue*, STATE J., 11/10/06, at 1; Brad McElhinny, *Who is the real Don Blankenship?*, CHARLESTON DAILY MAIL, 07/11/05, at 1A.

B. Proceedings Below

1. The underlying dispute in this case arose out of a coal-supply contract between Wellmore Coal Corporation, which was owned by respondent A.T. Massey, and two subsidiaries of petitioner Harman Development Corporation, owned by petitioner Caperton. Wellmore bought coal from the Harman subsidiaries and sold it to LTV Steel. LTV eventually stopped buying coal from Wellmore, leading Wellmore to invoke a *force majeure* clause in its contract with the Harman subsidiaries. The latter filed a breach-of-contract action against Wellmore in Buchanan County, Virginia, and obtained a $6 million judgment. JA491a-496a.

In the meantime, petitioners sued respondents in Boone County, West Virginia, alleging fraudulent misrepresentation and tortious interference with contract. Respondents moved to dismiss on the basis of (a) a forum-selection clause in the coal-supply con-

tract requiring suit to be filed in Virginia and (b) res judicata. The trial court denied the motion, and a jury awarded petitioners approximately $50 million in compensatory and punitive damages. JA496a-497a.

2. In October 2006, respondents sought review of the Boone County judgment from the West Virginia Supreme Court of Appeals. Nearly a year earlier, petitioners had requested that Justice Benjamin recuse himself when this case reached the court. JA104a-114a, 323a-335a. Relying almost entirely on the West Virginia Code of Judicial Conduct, they argued that Blankenship's expenditures in the 2004 campaign created an "appearance of unfairness" because he is Massey's CEO. JA108a. Petitioners' claim was premised primarily on newspaper articles and editorials. JA331a-334a. Justice Benjamin denied the motions. JA336a-338a.

The court voted unanimously to hear respondents' appeal, and, in November 2007, ruled in respondents' favor in a 63-page opinion by Chief Justice Davis, joined by Justices Maynard and Benjamin. JA340a-431a. Justices Albright and Starcher dissented.

3. Petitioners sought rehearing. While their petition was pending, petitioners renewed their request for Justice Benjamin's recusal, on "appearance of bias" grounds. JA432a-439a. The motion relied entirely on state law and did not mention the Due Process Clause. Justice Benjamin again denied the request. JA442a-445a.

The court subsequently voted unanimously to rehear the case. JA449a-452a. Before reargument, however, Justices Maynard (who had assumed the

chief-justiceship in the interim) and Starcher recused themselves. JA447a, 454a-462a. In his role as Acting Chief Justice, Justice Benjamin appointed circuit judges Cookman and Fox to fill the vacancies.

Petitioners then made a third request for Justice Benjamin's recusal. JA464a-468a. This request, again based entirely on state law, relied on a survey petitioners had commissioned that supposedly demonstrated a public perception that Justice Benjamin would not be fair in considering respondents' appeal. Justice Benjamin denied the motion (JA482a-483a), noting that a "push poll" specifically designed to support a recusal motion was "neither credible nor sufficiently reliable" (JA483a).

On the same day, April 3, 2008, the court issued its decision on rehearing, again reversing the verdict. JA485a-634a. Justice Davis wrote the 94-page majority opinion, joined by Justice Benjamin and Judge Fox; Justice Albright and Judge Cookman dissented. The court held that petitioners' suit should have been dismissed because the forum-selection clause was mandatory, covered the claims raised and the parties involved, and was not unjust or unreasonable. JA503a-537a. It further ruled the suit barred by res judicata, holding that petitioners sought similar remedies in both actions; the claims arose from the same conduct, transaction, or occurrence; there was sufficient identity of parties; and petitioners were similarly postured in both proceedings. JA567a-580a.

In a concurring opinion, Justice Benjamin addressed the disqualification issue at length. JA635a-700a. He rejected petitioners' assertion that "appearance-driven conflicts" can have "due process implications" and concluded that he was not disquali-

fied under this Court's decisions, because he has "no pecuniary interest in the outcome of this matter," "no conflicting dual role," and "no personal involvement with * * * [or] personal antipathy toward any party or counsel." JA665a. Justice Benjamin also explained that his recusal would not be required even under an "appearance" standard, because, among other things, "neither ASK nor Mr. Blankenship are parties," ASK "was completely independent" of his campaign, he "voted against Massey's position" in several "significant * * * cases," Justice McGraw's Labor Day speech "devastated" his own campaign, and the court's decision "was issued over three years after [the] election." JA673a-674a & n.29, 686a.

4. Approximately one month after the decision on rehearing, Justice Benjamin voted to deny Massey's petition for appeal in another case, *Massey Energy Co.* v. *Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008), cert. denied, 129 S. Ct. 626 (2008). That action left standing a $243 million judgment against Massey, the Nation's seventh largest verdict in 2007. See VerdictSearch, *Top 100 Verdicts of 2007*, *available at* http://www.verdictsearch.com/index.jsp?do=top100.

SUMMARY OF ARGUMENT

I. The writ of certiorari should be dismissed as improvidently granted. The theory that petitioners pressed in the court below, that Justice Benjamin passed upon, that petitioners advanced in their certiorari petition, and that this Court granted review to address is that the campaign expenditures at issue created an "appearance of bias" that required Justice Benjamin's disqualification. Tacitly acknowledging that an "appearance of bias" provides no *constitutional* basis for disqualification, petitioners have jet-

tisoned that theory and now contend that the expenditures were constitutionally disqualifying because they created a "probability of actual bias," a standard concededly different from the "appearance" standard previously advocated. By first raising this "probability of bias" theory at this juncture, petitioners deprived Justice Benjamin of the opportunity to pass on it; deprived respondents of the opportunity to convince the Court that the theory provides no basis for certiorari; were able to claim the existence of a lower-court conflict that does not exist with respect to their new theory; and induced the Court to accept the case on a false premise.

II. Alternatively, the decision below should be affirmed.

A. There is no basis in history, precedent, or this Court's practice for the notion that "bias" *in general*—much less a "probability of bias"—mandates disqualification under the Due Process Clause.

As to history: The common-law rule, in both England and America, was that a judge was disqualified if he had a pecuniary interest in the outcome of the case. "Bias" as such was not a basis for disqualification, and it did not become a generally accepted one in this country until the 20th century, when legislatures began to enact statutes requiring recusal on that ground.

As to precedent: Consistent with the common-law rule, this Court's due-process decisions have required disqualification based on a pecuniary interest in the outcome. Outside the context of contempt, where special rules apply, the Court has never held that disqualification is constitutionally required for any other reason.

As to this Court's practice: Justices have passed judgment on the constitutionality of statutes they helped write and reviewed decisions they rendered on lower courts. They hear cases in which their religious views, prior political affiliations, or friendships with counsel make it as reasonable as it is here to infer a "probability of bias," yet they are generally deemed capable of putting aside those influences. Sitting in those cases would become constitutionally problematic if "probability of bias" were the due-process standard.

B. Even if "probability of bias" *were* the constitutional standard, it could not be satisfied by the supposition that a judge might feel a "debt of gratitude" to a supporter, as petitioners maintain. To begin with, such a theory would have no limiting principle. There are countless forms of support for a judge that are at least as valuable as financial support—for example, a newspaper's endorsement, the backing of a prominent political figure or labor organization, or, in the case of an appointed judge, a nomination to the bench. Petitioners' theory would also be unworkable, because there is no certain or predictable way to identify the point at which a judge's "debt of gratitude" renders a case sufficiently "exceptional" (Br. 36) to require disqualification. A "debt of gratitude" theory would also create administrative problems for courts, which would be deluged with recusal motions if this vague and malleable theory were endorsed. Finally, petitioners' constitutional theory cannot be justified on the ground that it is necessary to ensure judicial impartiality. Every State already has a broad recusal law, and West Virginia, like many other States, has enacted further reforms to address such issues.

C. Even if petitioners' theoretical construct were accepted, disqualification would not be required here. Justice Benjamin voted *against* Massey affiliates in at least five other cases. There is no personal relationship between him and Blankenship. The money at issue was not solicited by or given to Justice Benjamin's campaign but was spent independently of it. And the expenditures were not made by any party to the case (but rather by an individual officer of one of the defendants). Those facts, and others, leave petitioners far short of overcoming the presumption of impartiality with which judges are and have for centuries been invested.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Petitioners' disqualification motions were based on the contention that Justice Benjamin had an impermissible "appearance of bias" under state law. JA104a-114a, 323a-335a, 432a-438a, 463a-468a. In denying the recusal motions, therefore, Justice Benjamin understandably addressed only "this matter of 'apparent conflict.'" JA658a. Among other things, his opinion rejected the proposition that "appearance-driven conflicts" can have "due process implications." JA665a.

In their certiorari petition, petitioners urged this Court to grant review to "clarify the circumstances" in which campaign expenditures can create a constitutionally disqualifying "appearance of bias" (Pet. 1-2); argued that this is one of the rare cases in which they do (Pet. 17); asked the Court to resolve an asserted lower-court conflict on whether "due process prohibits * * * the appearance of bias" (Pet. 21-22);

and asserted that Justice Benjamin's refusal to recuse himself "directly conflicts" with *Pierce* v. *Pierce*, 39 P.3d 791 (Okla. 2001), which found campaign contributions constitutionally disqualifying under an "appearance" theory (Pet. 24). Petitioners relied on the same theory in their supplemental and reply briefs. Over respondents' objection that "[a]ppearances are the stuff of codes and canons—not the Constitution" (Opp. 27), the Court granted certiorari.

Petitioners have now abandoned their "appearance" theory. They contend that the constitutional standard for judicial disqualification is not an "appearance of bias" but "a 'probability' that the judge is actually biased." Pet. Br. 18; compare Pet. Br. 3, 15-36, with Pet. 1-3, 16-28. "[T]he reality of bias or prejudice [and] its appearance" are different things. *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). Indeed, petitioners' merits brief explicitly acknowledges (at 23) that an "appearance" standard is "more stringent" (*i.e.*, more broadly requires recusal) than the "probability of actual bias" standard they now advocate. By abandoning an "appearance" standard, moreover, their brief effectively acknowledges what lower courts have recognized with near unanimity: that "bad appearances alone do not require disqualification" under the Constitution. *Del Vecchio* v. *Ill. Dep't of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc).

Under these circumstances, the writ of certiorari should be dismissed.

First, by failing to raise their "probability of bias" theory in the court below, petitioners deprived Justice Benjamin of the opportunity to address it, and would have this Court be the first to do so. But this

is "a court of review, not of first view" (*Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); it rarely decides issues "not raised or briefed below" (*TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001)).

Second, by failing to raise a "probability of bias" theory in their certiorari petition, petitioners unfairly deprived respondents of the opportunity to explain why review should not be granted to decide whether recusal was necessary under that theory. Cf. *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 171 (1999).

Third, by failing to raise their "probability of bias" theory at the petition stage, petitioners induced this Court to grant review on the false premise that the issue was whether due process prohibits a judge laboring under an appearance of bias from sitting and whether campaign expenditures can create a constitutionally disqualifying "appearance." To "maintain the integrity of the process of certiorari" (*Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992)), this Court ordinarily does not permit a party to petition on one theory, only to press a different theory after the Court has granted the petition. See also *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 353 n.* (1995). This is true even when the question presented is stated generally enough to encompass the new theory.

Fourth, by relying at the petition stage on the now-abandoned "appearance" theory, petitioners were able to assert a conflict among the lower courts. *Pierce*, the only decision to have held that financial support in judicial elections can be constitutionally disqualifying, did so under an "appearance" theory. See 39 P.3d at 798-799. Without *Pierce*, petitioners lack even a colorable claim that the lower courts are

divided on the question they are now asking the Court to decide: whether campaign expenditures can create a constitutionally disqualifying "probability of bias."

II. IF THE COURT REACHES THE MERITS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

If the Court does not dismiss the writ, it should affirm, for three independent reasons. *First*, contrary to petitioners' contention, "probability of bias" is not the constitutional standard for judicial disqualification. *Second*, even if "probability of bias" were the constitutional standard, it could not be satisfied by supposition that the judge might feel a "debt of gratitude" to a supporter. *Third*, there is here no sufficient "probability of bias" to support recusal.

A. "Probability Of Bias" Is Not The Constitutional Standard.

Petitioners' due-process claim depends on the premise that, when there is "a 'probability' of bias on a judge's part, the judge is constitutionally barred from participating in a case." Br. 20. That premise is unsound. As we explain below, there is no basis in history, precedent, or the practice of this Court for the notion that a judge's "bias" *in general*—let alone a mere "probability of bias"—mandates disqualification under the Due Process Clause. On the contrary, at common law disqualification was required only when the judge had a pecuniary interest in the outcome of the case and in certain contempt proceedings. This Court has never held that a judge is constitutionally barred from sitting for any other reason. And throughout the history of the Court, Justices

have sat on cases in which they had no financial interest but a "reasonable observer" might think that there was a "probability of bias." Under the correct standard, Justice Benjamin had no constitutional obligation to recuse himself.

1. A "probability of bias" standard has no basis in history.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). Under both English and American common-law practice during the 18th and 19th centuries, a judge was disqualified "for possessing a direct financial interest in the cause before him, and for absolutely nothing else." RICHARD FLAMM, JUDICIAL DISQUALIFICATION § 1.2, at 6 (2d ed. 2007). Disqualification for bias—and, *a fortiori*, for a *probability* of bias—is "a complete departure from common law principles." John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 618-619 (1947).

a. "English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest." Frank, *supra*, at 611-612. The English rule reflected the age-old maxim that "no man shall be a judge in his own case." *Id.* at 610; see 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *141a (1797). Disqualification was thus required, for example, in cases in which the judge stood to profit from any fines assessed (*e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609); *Between the Parishes of Great Charte & Kennington*, 93 Eng. Rep. 1107 (K.B. 1726)) and in ejectment actions where the judge was the landlord (*e.g.*, *Earl of Derby's Case*, 77 Eng. Rep.

1390 (K.B. 1614); *Anonymous*, 91 Eng. Rep. 343 (K.B. 1698)).

While 17th- and 18th-century English common law disqualified a judge with a pecuniary interest, "[n]o other disqualifications were permitted." Frank, *supra*, at 612. In particular, "[r]equired judicial recusal for bias did not exist in England at the time of Blackstone." *Liteky*, 510 U.S. at 543. Indeed, bias "was rejected entirely" as a ground for disqualification. Frank, *supra*, at 612. As Blackstone himself put it, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *361 (1765).

b. "The United States took over that tradition." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). "In the pre-Revolutionary American Colonies, as in England, the only accepted ground for disqualifying a judge was pecuniary interest in a pending cause * * *." FLAMM, *supra*, § 1.4, at 8. Otherwise, a presumption of impartiality prevailed. That remained the common-law rule in the years leading up to the Fourteenth Amendment and beyond. See, *e.g.*, *Board of Justices* v. *Fennimore*, 1 N.J.L. 190 (1793); *Pearce* v. *Atwood*, 13 Mass. 324 (1816); *Bates* v. *Thompson*, 2 D. Chip. 96 (Vt. 1824); *Gregory* v. *Cleveland, Columbus & Cincinnati R.R. Co.*, 4 Ohio St. 675 (1855); *Wetsel* v. *State ex rel. Holland*, 5 Tex. Civ. App. 17 (1893).

While "interest [wa]s a sufficient ground for disqualification, prejudice [wa]s not." Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 79 (1927). During this same period, Ameri-

can courts consistently held that "bias and prejudice constituted no legal incapacity to sit in the trial of a cause." *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and The Oregon Experience*, 48 OR. L. REV. 311, 327 (1969).[2] Indeed, as late as 1891, a "comprehensive review of American precedent" revealed that there was "only a 'solitary authority for the principle' that, in the absence of a statute, bias or prejudice should be a ground for disqualification." *Id.* at 330 (quoting *In re Davis' Estate*, 27 P. 342, 345 (Mont. 1891)).

c. It was not until a few decades into the 20th century that disqualification for bias enjoyed anything approaching widespread acceptance in the United States. See Robert Levinson, *Peremptory Challenges of Judges in the Alaska Courts*, 6 UCLA-ALASKA L. REV. 269, 271 (1977). Even then, disqualification on that ground was generally prescribed by statute rather than common law. See *Disqualification of Judges*, 48 OR. L. REV. at 332-348. In the federal system, for example, district judges were not

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[2] See, *e.g.*, *Boswell* v. *Flockheart*, 8 Leigh 364, 364 (Va. 1837) (no disqualification though "great hostility had existed on the part of the judge towards [the party]"); *McCauley* v. *Weller*, 12 Cal. 500, 523 (1859) (no disqualification though judge had "expressed himself so strongly in favor of plaintiff's right to recover, as to occasion remonstrance from bystanders"); *Lovering* v. *Lamson*, 50 Me. 334, 334 (1863) (no disqualification though judge "had been the friend and legal adviser of the [party], in the matter"); *Jones* v. *State*, 32 S.W. 81, 83 (Ark. 1895) (no disqualification though judge admitted that "he had a fixed opinion as to the guilt or innocence of the defendant"); *Bryan* v. *State*, 41 Fla. 643, 657 (1899) (no disqualification though "the[re] existe[d] * * * extreme bitter feeling and animosity between the judge and the defendant, [which] had become so notorious as to attract the attention of the people generally").

subject to disqualification for bias until 1911, when Congress amended the recusal statute. See *Liteky*, 510 U.S. at 544.

One of the stated purposes of another federal recusal statute, 28 U.S.C. § 455, is "to promote public confidence in the impartiality of the judicial process." H.R. Rep. No. 1453, 93rd Cong., 2d Sess. 5 (1974). Petitioners contend that the Due Process Clause should be interpreted to require disqualification for a "probability of bias" for the same reason: to preserve the "legitimacy of the judicial branch" and the "public's confidence" in it. Br. 24. That assertion finds no support in either history or logic. The Due Process Clause protects the rights of individuals, not the public reputation of state judiciaries. That is one of the reasons why questions of "bias" have historically been regulated by statute rather than the Constitution, and by the States rather than through federal intervention.

2. A "probability of bias" standard has no basis in precedent.

a. In his treatise, Professor Cooley explained that due process encompasses the "maxim of the common law" that one may not "act judicially when interested in the controversy." THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 411-412 (1868). This Court's due-process decisions likewise apply "exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit." *Del Vecchio*, 31 F.3d at 1391 (Easterbrook, J., concurring). Those decisions do not recognize "bias"—much less "probability of bias"—as a general ground for disqualification under the Constitution.

i. In its first decision on the subject, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), this Court held that it was unconstitutional for a judicial officer to hear a criminal case when the officer personally received fees and costs only in the event of a conviction. The Court concluded that due process requires disqualification when the judge has "a direct, personal substantial pecuniary interest" in deciding the case against a party. *Id.* at 523. "[I]n determining what due process of law is," the Court looked to "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors." *Ibid.* Citing common-law cases from England and the United States, the Court explained that "the general rule" in both countries was that judges were "disqualified by their interest in the controversy" and that, in England, a decision was "voidable" when the judge had a "pecuniary interest" in the outcome. *Id.* at 522, 524. The Court was careful to point out, however, that not "[a]ll questions of judicial qualification * * * involve constitutional validity"—and, in particular, that "personal bias" is generally a matter of "*legislative discretion*." *Id.* at 523 (emphasis added).

Relying on *Tumey*, the Court applied the same constitutional rule in three cases in the 1970s. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (village mayor prohibited from adjudicating certain criminal cases when fines resulting from conviction constituted half of village's finances, for which mayor had responsibility); *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("pecuniary interest" disqualified members of administrative board from conducting license-revocation hearings); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (per curiam) (due-process violation where

justice of the peace was paid only if search warrant issued).

ii. In its most recent due-process decision on judicial disqualification, *Aetna Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court applied both aspects of the common-law rule. The challenged judge was found not constitutionally disqualified from participating in a case against an insurance company because of "bias or prejudice" arising from the judge's "hostility" towards insurance companies that were dilatory in paying claims. *Id.* at 820. But the Court then ruled that the judge *was* disqualified because of a "pecuniary interest" arising from the pendency of the judge's "very similar" lawsuit against another insurance company. *Id.* at 822.

In finding no constitutionally disqualifying "bias," the Court repeated what it had said nearly 60 years earlier in *Tumey*—that "personal bias" is generally a matter of "legislative discretion" rather than "constitutional validity." 475 U.S. at 820 (quoting *Tumey*, 273 U.S. at 523). The Court then cited "the traditional common-law rule * * * that disqualification for bias or prejudice was not permitted." *Ibid.* While noting the "recent trend * * * towards the adoption of statutes that permit disqualification for bias or prejudice," the Court emphasized that "that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Ibid.* Due process is violated, the Court explained, only when a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 821 (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). The Court ultimately did not decide whether "bias or prejudice" could ever require dis-

qualification under the Constitution, because, even assuming that it could, the "bias and prejudice" alleged there would not rise to the level of unconstitutionality. *Ibid.*

In ruling that the judge *did* have a constitutionally disqualifying "interest," the Court applied the same principle as in *Tumey*. Disqualification was required because a decision against the insurance company could "enhanc[e] both the legal status and the settlement value of [the judge's] own case" (475 U.S. at 824), thereby giving the judge a "direct, personal, substantial, pecuniary interest" in the outcome of the case in which he participated (*id.* at 822 (quoting *Tumey*, 273 U.S. at 523)).

b. This Court has held recusal constitutionally required in only three cases *not* involving a pecuniary interest: *In re Murchison*, 349 U.S. 133 (1955); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); and *Taylor* v. *Hayes*, 418 U.S. 488 (1974). But the rules applied in those cases are limited to the specific context of contempt and lack applicability to an ordinary civil or criminal case. The decisions are also consistent with the common-law distinction, recognized in the *Tumey-Lavoie* line of decisions, between personal "interest" and "bias."

i. Mayberry and *Taylor* held that due process bars a judge from adjudicating contempt charges when the contemptuous conduct occurred during a proceeding at which the alleged contemnor and the judge had become "embroiled in a running controversy." *Mayberry*, 400 U.S. at 465; *Taylor*, 418 U.S. at 501. That rule, which is ultimately traceable to *Cooke* v. *United States*, 267 U.S. 517 (1925), a case involving this Court's supervisory authority, reflects the concerns that the exercise of the contempt power

is "a delicate one" (*id.* at 539); that that power has a "heightened potential for abuse" (*Taylor*, 418 U.S. at 500); and that "care is needed to avoid arbitrary or oppressive conclusions" in contempt cases (*Cooke*, 267 U.S. at 539).

The rule adopted in *Murchison* is even narrower. The holding of that case is that "a judge acting as a one-man grand jury investigating crime could not [try] for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings." *Ungar* v. *Sarafite*, 376 U.S. 575, 585 (1964). Although *Murchison*'s holding rested in part on the view that "the judge in effect [had] bec[o]me part of the prosecution and assumed an adversary position," the decision "has not been understood to stand for the broad rule" that due process is violated in other contexts by the simultaneous exercise of prosecutorial and adjudicative powers. *Withrow* v. *Larkin*, 421 U.S. 35, 53 (1975).

ii. Apart from being contempt-specific, the rules applied in *Murchison*, *Mayberry*, and *Taylor* do not rest on any generalized acceptance of a constitutional "probability of bias" standard.

Insofar as *Murchison* applied a version of the rule that "prosecut[ors] [may not] be trial judges of the charges they prefer" (*Murchison*, 349 U.S. at 137) that rule is a close relative of the no-pecuniary-interest rule applied in the *Tumey-Lavoie* line of cases, because a judge who is in effect a party to a case has an *interest* in the outcome. Indeed, *Murchison* explicitly invoked the principle that "no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136.

What is true of *Murchison* is equally true of *Mayberry* and *Taylor*. As Judge Easterbrook has observed, the rule applied in the latter cases, at bottom, is that "a judge should not preside in a case in which he was the *victim* of [the] crime" being prosecuted. *Del Vecchio*, 31 F.3d at 1392 (concurring opinion).

c. Petitioners' proposed standard is ultimately based on a single sentence from *Tumey* and a single sentence from *Murchison*. See Br. 19-22. But neither can reasonably be read to have established the open-ended and ahistorical "probability of bias" test that petitioners advocate.

The language from *Tumey* is this: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law." 273 U.S. at 532. This was not a general observation about judicial bias, however, but a statement focused on an aspect of pecuniary-interest disqualifications. By that point in the opinion, the Court had already established the constitutional rule that disqualification is mandated when a judge has a *pecuniary interest* in the outcome. *Id.* at 522-526. The sentence at issue appeared in connection with defining the scope of an additional aspect of pecuniary-interest disqualification: that the financial interest not be so "minute, remote, trifling, or insignificant" that it "may properly be ignored as within the maxim *de minimis non curat lex*." *Id.* at 531-532.

Petitioner also relies on this language from *Murchison*: "[O]ur system of law has always endeavored to prevent even the probability of unfairness." 349

U.S. at 136. Putting aside that this was dictum, and that "unfairness" is not the same as "bias," this general language does not suggest a constitutional rule that a judge must recuse whenever there can be said to be a "probability of bias," as is clear from the very next sentence: "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Ibid.* The Court's use of the "probability of unfairness" language may explain why disqualification is required when a judge has an interest in the outcome or would be judging his own case, but it cannot reasonably be understood to mean that a "probability of unfairness" requires disqualification even when those circumstances are not present.

Petitioners also rely on out-of-context quotations from *Withrow* and *Taylor*. Br. 21 n.3. *Withrow*—in which disqualification was found *not* required—said that a "probability of actual bias" is "constitutionally [in]tolerable," not in all cases, but in "various situations," specifying those in which the judge "has a pecuniary interest in the outcome" (the *Tumey-Lavoie* situation) or "has been the target of personal abuse or criticism from the party" (the *Mayberry-Taylor* situation). 421 U.S. at 47. Similarly, *Taylor* described "likelihood of bias" as the relevant "inquiry," not in deciding whether disqualification is constitutionally required as a general matter, but in deciding whether particular "contemptuous conduct" that "embroil[s] [a judge] in controversy" requires disqualification. 418 U.S. at 501.

3. A "probability of bias" standard has no basis in the practice of this Court.

If "probability of bias" were the constitutional standard, many Members of this Court would quite

likely have been acting unconstitutionally by participating in numerous cases decided over the past 200 years. For example, "[o]ur legal culture's most revered judicial decision, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803), was rendered by John Marshall—who just happened to be the cause of the litigation." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). Justices have also passed judgment on legislation they helped write. See *Laird* v. *Tatum*, 409 U.S. 824, 831-832 (1972) (Rehnquist, J., in chambers); *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). For example, Chief Justice Chase, who devised the greenback legislation, determined its legality in *The Legal Tender Cases*, 12 Wall. (79 U.S.) 457 (1871); Justice Black, the principal author of the Fair Labor Standards Act, joined in upholding its constitutionality in *United States* v. *Darby*, 312 U.S. 100 (1941); and Justice Frankfurter, who played a critical role in drafting the Norris-LaGuardia Act, interpreted its scope in *United States* v. *Hutcheson*, 312 U.S. 219 (1941). For more than a century after the first Judiciary Act, moreover, Justices "hear[d] appeals from their own decisions on circuit." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). Even after the abolition of that practice, Justice Holmes "sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court." *Laird*, 409 U.S. at 836.

Although it could easily be said that Members of this Court harbored a "probability of bias" in each of the cases described above, disqualification was thought to be unnecessary because the Justices had no pecuniary interest in the outcome. Unlike in *Marbury*, Chief Justice Marshall did have such an

interest in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), which explains his recusal there. See G. Edward White, *The Marshall Court and Cultural Change*, 1815-35, in 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 165-168 (Paul Freund & Stanley Katz eds. 1988).

It could just as easily be said that a "probability of bias" can arise from personal friendship with a party or counsel; political or religious affiliation or affinity; and the like. But Members of this Court have never considered disqualification to be constitutionally required for such reasons. See, *e.g.*, *Cheney* v. *District Court*, 541 U.S. 913, 916-920 (2004) (Scalia, J., in chambers).

4. Under the correct constitutional standard, recusal was not required.

Because he had no pecuniary interest in the outcome, Justice Benjamin was not constitutionally barred from participating in the decision below. Nor is this case governed by *Murchison*, *Mayberry*, or *Taylor*, because it does not involve a charge of contempt; Justice Benjamin was not simultaneously serving as judge, prosecutor, and complaining witness; he was not a "victim" of anything that happened in the case; and he was not embroiled in a "running controversy" with any of the parties.

It is telling, in this connection, that one set of petitioners' amici candidly acknowledges that Justice Benjamin was not required to recuse himself under the Due Process Clause as it has always been understood. Instead, on the basis of "[n]ovel practices" and "recent innovation[s]" in judicial elections that they consider problematic, these amici call for a "new paradigm[] of due process" and ask the Court to "ex-

tend the common law prohibition" embodied in the Due Process Clause. 27 Former Chief Justices & Justices (FCJJ) Br. 10, 13. But recusal statutes adopted by every State already go well beyond the "common law prohibition." See Am. Bar Ass'n (ABA) Br. 14 & nn.28-29. If those statutes are thought inadequate to the challenges posed by judicial elections, then additional legislation may be appropriate; in fact, numerous reforms are already underway. See *infra* pp. 47-48. But the developments that concern petitioners' amici provide no warrant to say that the Constitution now means something it has never meant before.

B. Even If "Probability Of Bias" Were The Constitutional Standard, A Judge's Supposed "Debt Of Gratitude" To A Supporter Could Not Satisfy The Standard.

According to petitioners, there was a "probability of bias" in this case because "it would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship" for his expenditures in opposition to Justice McGraw's reelection, and Justice Benjamin had "reason to repay his debt of gratitude to Mr. Blankenship" by voting in favor of Massey's subsidiaries. Br. 31, 33. Even if this Court's decisions could be thought to have swept aside the presumption of judicial impartiality in favor of "probability of bias" as the general standard for judicial disqualification under the Constitution, that standard would not be satisfied by the possibility that the judge would feel a "debt of gratitude" to a litigant.

Every lower court but one to consider the question has held that campaign expenditures by a party or attorney do not require disqualification under the

Due Process Clause. See *Shepherdson* v. *Nigro*, 5 F. Supp. 2d 305, 310-311 (E.D. Pa. 1998) (collecting cases). The one case that reached a different conclusion employed a rationale—"appearance of bias"—that petitioners no longer defend. See *Pierce*, 39 P.3d at 798-799. Indeed, consistent with this Court's holdings, many lower courts have concluded that, whatever the precise constitutional standard, disqualification is required only when the judge has a pecuniary interest in the outcome, has a dual role, or has become embroiled in a running controversy with a party. See, *e.g.*, *Richardson* v. *Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008); *Crater* v. *Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007).

There is good reason for this judicial consensus. A feeling of "gratitude," which all candidates have towards their supporters, differs fundamentally from a feeling of "debt," especially debt of a kind to be repaid by distortion of the judicial task. Moreover, as we explain below, the theory that a "debt of gratitude" can create a constitutionally disqualifying "probability of bias" would have no limiting principle, would be entirely unworkable, and would create serious administrative problems for courts. Nor is petitioners' broad constitutional rule even necessary, because the States have proven themselves quite capable of policing this area.

1. A "debt of gratitude" theory would have no limiting principle.

A judge's "debt of gratitude" arising from an election expenditure is analytically indistinguishable from a "debt of gratitude" arising from countless other forms of support for a judge's election or appointment, many of which are as valuable as money—or more valuable. If expenditures could cre-

ate a debt that necessitated recusal under a "probability of bias" standard, therefore, other debts would have to be treated the same way. But debts of this type are endemic, and petitioners' "brand of argument" therefore "cannot be cabined." *Del Vecchio*, 31 F.3d at 1389 (Easterbrook, J., concurring).

a. One obvious example of non-financial support for which an elected judge might be supposed to feel a strong "debt of gratitude" is a newspaper's endorsement, which "many voters look to" in judicial elections. Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 671 (2002). Indeed, a key endorsement may be worth more than large monetary expenditures. See, *e.g.*, *ibid.* (judicial candidates who received newspaper endorsements enjoyed "an increase of 6.11 percentage points" over candidates who did not). Yet it has never been thought that disqualification is necessary in a case in which a newspaper that endorsed the judge is a party, even under statutory recusal provisions broader in reach than the constitutional standard advocated by petitioners. See, *e.g.*, *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911, 919 (6th Cir. 1982).

In the contentious 2004 Mississippi Supreme Court election, for example, Mississippi's leading daily newspaper, the *Clarion-Ledger*, endorsed Justice James Graves, who eventually won. *Supreme Court*, CLARION-LEDGER, 10/28/04, at 10A. Justice Graves nevertheless participated in several subsequent cases in which the *Clarion-Ledger* was a party. *E.g.*, *Gannett River States Publ. Co.* v. *Entergy Miss., Inc.*, 940 So. 2d 221 (Miss. 2006). Similarly, in the 2004 Ohio Supreme Court election, the highest-circulation newspaper in Cincinnati, the *Enquirer*,

endorsed Justices Moyer, O'Donnell, Pfeifer, and Lanzinger. *Keep incumbents on Supreme Court*, CINCINNATI ENQUIRER, 10/27/04, at 6C. Those justices nevertheless participated in subsequent cases involving the paper. *E.g.*, *State ex rel. Cincinnati Enquirer* v. *Daniels*, 844 N.E.2d 1181 (Ohio 2006).

Nor could the theory be limited to newspapers. An important endorsement by a labor organization, trade association, or civic group could also be as valuable to a judicial candidate as substantial financial expenditures, and thus could likewise require disqualification under petitioners' theory when the endorser is a party or amicus. The same is true of support from a political party or politician. For example, if a State's governor endorsed a judicial candidate, the candidate, if elected, would ordinarily feel a very strong "debt of gratitude" to the governor, and thus, under petitioners' theory, would be disqualified from sitting at least in cases involving policies that were a high priority of the governor. The debt owed to a popular governor might well be far greater than that owed even to a large financial contributor, and yet it has never been thought that "sponsorship" or "other indicia of political support" require disqualification—under any standard—when the sponsor or supporter comes before the court. *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990).

b. Indeed, petitioners' theory cannot be confined even to elected judges. The logic of the theory would lead to disqualifying appointed judges, including federal judges, in many circumstances in which recusal has never been thought necessary.

If substantial financial support for an elected judge can create a constitutionally disabling "debt of gratitude," for example, then surely the act of nomi-

nating an appointed judge would do so even more emphatically, given the indispensable role of the appointer in the process. Members of this Court, however, have not recused themselves merely because the President who nominated them was a party, even in cases in which the Court's decision was certain to be far more consequential to the President personally than the decision in this case was to Blankenship. For example, three Justices appointed by President Nixon participated in *United States* v. *Nixon*, 418 U.S. 683 (1974), which led to the President's resignation.[3] Two Justices appointed by President Clinton participated in *Clinton* v. *Jones*, 520 U.S. 681 (1997), which determined whether a sexual-harassment suit against him could go forward while he was in office. And four Justices appointed by President Truman participated in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), which involved the government's seizure of steel mills, an issue of extraordinary importance to the President. Far from deeming themselves constitutionally disqualified from sitting in these cases, the Justices did not believe that disqualification was necessary even under the broader recusal *statute*.

c. If a judge could be disqualified under the Due Process Clause from hearing a case in which he allegedly had an incentive to repay a "debt of gratitude" to a party for its support, then a judge should equally be disqualified from hearing a case in which he had an incentive to exact *revenge* against a party

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[3] A fourth Justice—then-Justice Rehnquist—did recuse himself, but not because he was the President's appointee. See Jay Bybee & Tuan Samahon, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1735, 1748 n.76 (2006).

for its *opposition*. Here, for instance, it is at least as likely that McGraw is biased *against* Massey as a result of Blankenship's expenditures as that Benjamin is biased in its favor. McGraw was recently elected a circuit judge in Wyoming County. See Justin Anderson, *Warren McGraw, Rick Staton sweeping back into local offices*, CHARLESTON DAILY MAIL, 5/16/08. Accordingly, under petitioners' theory, the Due Process Clause would require his recusal in all cases in which a Massey affiliate was a party.

As amicus Conference of Chief Justices points out (at 26 n.49), these are two sides of the same coin: "efforts to defeat a judge are every bit as likely to affect that judge's attitudes toward a party as are efforts to support that judge." Yet it has never been thought that disqualification might be even *statutorily* required because a party or attorney opposed the judge's election or appointment. See, *e.g.*, *United States* v. *Helmsley*, 760 F. Supp. 338 (S.D.N.Y. 1991) (Walker, J.) (denying disqualification motion by lawyer who testified against district judge's nomination to court of appeals), aff'd, 963 F.2d 1522 (2d Cir. 1992); *Grievance Adm'r* v. *Fieger*, 714 N.W.2d 285, 286 (Mich. 2006) (Markman, J.) (denying disqualification motion by lawyer who opposed supreme court justice's reelection).

That is true even when the opposition is very substantial. When Justice Thomas was nominated to this Court, for example, several of the Nation's most prominent and influential organizations, including the NAACP and AFL-CIO, opposed his nomination. See, *e.g.*, Steven Holmes, *N.A.A.C.P. and Top Labor Unite to Oppose Thomas*, N.Y. TIMES, 8/1/91, at A1. Several of the same organizations, including the ACLU, Planned Parenthood, and the Si-

erra Club, opposed the nomination of Justice Alito. See, *e.g.*, David Kirkpatrick, *Liberal Coalition is Making Plans to Take Fight Beyond Abortion*, N.Y. TIMES, 11/14/05, at A1; Letter from ACLU to U.S. Senate (1/27/06), *available at* http://www.aclu.org/scotus/2005/23964leg20060127.html. Many of these organizations frequently appear before the Court as parties or amici (who often have as much stake in a legal issue as the parties), and yet neither Justice has thought it necessary to recuse himself in such cases. See, *e.g.*, *NAACP* v. *City of Columbia*, 513 U.S. 1147 (1995); *AFL-CIO* v. *FEC*, 539 U.S. 912 (2003); *Mass.* v. *EPA*, 549 U.S. 497 (2007) (Sierra Club); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007) (Planned Parenthood); *ACLU* v. *NSA*, 128 S. Ct. 1334 (2008).[4]

Disqualification is thus not constitutionally required in such circumstances even though it would "only be natural" (Pet. Br. 31) for Justices to resent—and therefore, under petitioners' theory, have a "probability of bias" towards—major organizations that sought to prevent them from becoming Members of this Court. See also Richard Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 408-409 (2003) (concluding that Justice Thomas was not statutorily disqualified from participating in *Bush* v. *Gore*, 531 U.S. 98 (2000), even though then-Senator Gore had voted against his confirmation).

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[4] Similarly, amicus Public Citizen opposed the nomination of Justice Breyer (see Nancy E. Roman, *Breyer opposed by wide range of interest groups*, WASH. TIMES, 7/16/94, at A3), who has not recused himself in cases—including this one—in which that organization has been an amicus or party (see, *e.g.*, *DOT* v. *Public Citizen*, 541 U.S. 752 (2004)).

d. In addition to advancing a backward-looking "debt of gratitude" theory, petitioners stretch to suggest that there can be a "probability of bias" where a judge might fear that a vote against a financial supporter "may foreclose the possibility of similar financial support when the judge seeks reelection" in the future. Br. 31. But the possibility that a judge "may be tempted to defer unduly to the decisions or preferences of potential supporters * * * does not require disqualification" even under the broader statutory standard. *In re Mason*, 916 F.2d at 387. That is particularly so when, as in this case, the judge would not be up for reelection for many years, has not announced any intention to run again, and has no basis to anticipate recurrence of the special circumstances that prompted the large expenditures in the prior election. Cf. *Laxalt* v. *McClatchy*, 602 F. Supp. 214 (D. Nev. 1985) (disqualification of magistrate not required though she had previously sought support of plaintiff Senator for district-court seat and might do so again).

If the possibility that a judge might curry favor with a party to obtain a substantial future benefit were a constitutional ground for disqualification, then the Due Process Clause would "require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court * * * to recuse himself from cases where the Government represents one side" and the case "is 'hotly contested' and of particular interest to the Administration." Ronald Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187, 1197 (2006). As Professor Rotunda, one of the foremost authorities on legal ethics, has concluded, however, disqualification is not even *statutorily* required in that circumstance. See *id.* at

1196-1204, 1211. And the judge in the real-world case that prompted these views on the subject—then-Judge (now Chief Justice) Roberts in *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), rev'd, 548 U.S. 557 (2006)—drew the same conclusion: he did not recuse himself.

2. A "debt of gratitude" theory would be unworkable.

In addition to being limitless, petitioners' "debt of gratitude" theory would be unworkable. Petitioners contend that campaign expenditures would be constitutionally disqualifying under their theory only in rare cases. Br. 26-27. They have no choice but to take that position, because a broader disqualification rule would make it all but "impossible for [elected judiciaries] to function" (*Adair* v. *Mich. Dep't of Educ.*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.)) and thus would be tantamount to saying that States may not elect their judges. There is no remotely workable method, however, for distinguishing the "exceptional" cases (Pet. Br. 36) in which expenditures would create a disqualifying "debt of gratitude" from cases in which they would not.

a. In opposing certiorari we pointed out that the petition failed to offer "a workable constitutional standard" for when disqualification would be required. Opp. 13. In reply, petitioners defended that failure by asserting that "the articulation of a specific 'constitutional standard' is generally best left for a brief on the merits." Reply Br. 9. Petitioners have now filed their brief on the merits, and still they offer no workable constitutional standard.

Indeed, one of the more remarkable features of petitioners' brief is that it does not suggest *any* test for distinguishing what the Constitution prohibits from what it permits. Petitioners say merely that, "[w]hen viewed together, the facts surrounding" Blankenship's expenditures establish that Justice Benjamin probably felt a sufficient "debt of gratitude" to him to create an impermissible "probability of bias" in favor of Massey's subsidiaries. Br. 16. As far as a constitutionally disqualifying expenditure is concerned, in other words, petitioners apparently "know it when [they] see it" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), and the expenditures here are to their eyes constitutionally disqualifying. Petitioners failed to deliver on their promise to provide a workable constitutional standard, not because they forgot, or because they changed their minds, but because they were unable to craft one.

The briefs filed by petitioners' amici confirm that there is no workable standard. Those briefs do propose tests, but they offer three different ones, and all are of the multi-factor variety. The number of factors ranges from four (ABA Br. 19-20), to six (Ctr. for Political Accountability (CPA) Br. 18-19), to ten (Public Citizen Br. 15)—conveniently grouped, as in the Texas sharpshooter fallacy (http://en.wikipedia.org/wiki/Texas_sharpshooter_fallacy), around the facts of this particular case—although each amicus candidly admits that the factors in its test are non-exclusive. Amicus Conference of Chief Justices, which has filed a brief in support of neither party, also proposes a test (at 25-29), this one with seven non-exclusive factors. After proposing its test, which includes such factors as whether the spending was "significant" and whether the "nature" of the spend-

ing was "likely" to affect the election, one set of amici emphasizes—without apparent irony—the need for a "clear, practical due process standard" in this area. CPA Br. 18-20.

In contrast to these proposed tests, and consistent with this Court's recusal decisions, the nearly uniform view of the lower courts has been that campaign expenditures by a party or attorney cannot disqualify a judge under the Due Process Clause. "As against this approach, so familiar and * * * easy, the proposed * * * [multi]-factor test would be hard to apply, jettisoning * * * predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a [lower] court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Moreover, judicially created multi-factor constitutional tests in this area entail "the type of policy making more appropriately undertaken by the pertinent state authorities." *Shepherdson*, 5 F. Supp. 2d at 311. That type of "line-drawing process" is "properly within the province of legislatures, not courts." *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982) (per curiam) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 275-276 (1980)).

b. Even if the facts identified by petitioners as supporting their recusal claim (Br. 27-30) could be understood to suggest some sort of generally applicable test, and putting aside the problems associated with multi-factor tests, the test still would not be a workable one.

i. As an initial matter, the facts on which petitioners rely provide no principled basis for deciding when the circumstances of a particular case place it on the wrong side of the constitutional line.

Size. Petitioners rely mainly on the "sheer volume" and relative size of the financial support. Br. 27. They obviously take the position that the amount here was too high, but they offer no guidance for determining the point at which expenditures might become constitutionally disqualifying. Some amici do seek to provide guidance, but their adjectives are hopelessly unenlightening: one says that the sum must be "significant" (CPA Br. 18); another that it must be "substantial" (FCJJ Br. 12); two others that it must be "outsized" (Am. Ass'n for Justice Br. 11; Comm. for Econ. Dev. Br. 14); and another that it must be "unusually large," in either "absolute or relative terms" (ABA Br. 19). Indeed, amicus Conference of Chief Justices all but concedes that it is impossible to provide any guidance on the subject. "Even within a single State, from year to year, from court to court, or from county to county," it says, "an amount that might possibly offend due process in one instance will simply not in another." CJC Br. 26. Under these "standards," contributors, parties, attorneys, and judges will simply be left to guess how much is too much.[5]

Solicitation. Petitioners also rely on the (asserted) fact that Blankenship "solicited donations" on behalf of the judge. Br. 29. But see *infra* n.8. Solicitation of donations obviously has some value, but it is hard to see how this can be considered a separate factor in the analysis rather than, at most, some additional amount to be added to the supporter's own

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[5] Here, for instance, Doctors for Justice contributed $750,000 to ASK in an effort to unseat Justice McGraw. Would that amount be large enough, under petitioners' theory, to require Justice Benjamin to recuse himself in medical-malpractice cases?

expenditures. Whether or not "solicitation" was considered a separate factor, however, it would carry its own uncertainties, there being no obvious formula for allocating the contribution between the soliciting supporter and the contributor.

Timing. Petitioners also point to the fact that the expenditures here were made when an appeal was anticipated to the court on which the candidate would sit. Br. 29. If petitioners' theory is that expenditures can cause a judge to feel a "debt of gratitude" to the person who makes them, however, it is very hard to understand why this should be a relevant consideration. Petitioners say that the proximity of expenditures to the filing of a case may "strongly suggest" that the expenditures were "intended to influence the outcome." *Ibid.* Apart from the implausibility of such speculation here (see *supra* note 1), any such intent on the part of a *supporter* is unrelated to whether the *judge* will feel a "debt of gratitude." If anything, a judge would be *less* likely to allow himself to be influenced by any feeling of indebtedness for an expenditure made close in time to the filing of a case, precisely *because* of the possible public "perception that the contribution was made to influence the judicial decision." ABA Br. 20. In short, petitioners have here unwittingly lapsed into an "appearance" argument quite disconnected from any probability of actual bias.

Reviewability. Petitioners also point to the fact that the judge's decision to participate "was not subject to review by the other members of his court." Br. 29-30. This is the same practice followed by this Court. In any event, the availability of further review bears no relation to whether particular campaign expenditures will cause a judge to feel a "debt

of gratitude" to the person who makes them, and in turn a bias to favor that person or his associates. At most, this consideration implicates a distinct procedural issue.

ii. In the end, the only fact identified by petitioners that has any real relevance to their "debt of gratitude" theory concerns the size of the expenditure, and neither petitioners nor their amici offer a workable test for determining how much is too much. Numerous other considerations would make any attempt to place a value on a "debt of gratitude" even more complex and unmanageable, and in many cases simply impossible.

Direct vs. independent. As amicus Conference of Chief Justices points out (at 26-27), independent expenditures like those at issue are materially different from direct contributions to a candidate. Because a candidate has no control over the former, a judge would feel a lesser "debt of gratitude" than he or she would for the latter. Indeed, independent spending "may prove counterproductive" (*Buckley* v. *Valeo*, 424 U.S. 1, 47 (1976) (per curiam)); it can "backfire[] against the [judicial] candidate it was intended to advance" (Conference of Chief Justices (CCJ) Br. 27 n.50); see *ibid.* (providing examples)). In that circumstance, the judge might feel *no* "debt of gratitude" towards the party who made the expenditures.

Corporation vs. employee. Petitioners' theory would also have to account for the situation, also present here, in which expenditures are made by an individual who is an officer or employee of a corporation (or one of its many affiliates) that is or becomes a party before the judge. In that circumstance, the quantum of "gratitude" to the supporter could not

automatically be carried over to the party. Amicus Conference of Chief Justices flags the problem but does not offer any solution, suggesting only that "the closer the identity between the supporter and the party, the more likely that due process concerns will be implicated." Br. 29.

Coordinated collective contributions. A similar problem would arise in the reverse situation: where the expenditures were made by an organization and the party or attorney before the court was a member of or contributor to the organization. Here, for instance, plaintiffs' lawyers contributed approximately $1.5 million to West Virginia Consumers for Justice, a group that supported Justice McGraw's reelection. Anyone at all familiar with the politics of judicial elections would realize that there is every bit as much "probability of bias" in these circumstances as in those of the present case. If Justice McGraw had won, would he have been obligated to recuse himself in cases in which one of those lawyers represented the plaintiff? Would Justice Benjamin be required to recuse himself in such cases because of a "probability" of *negative* bias?

Support vs. opposition. Petitioners' theory also requires accounting for the situation, as here, in which the expenditures were mainly for the purpose of opposing the judge's opponent, rather than supporting the judge. In that circumstance, the judge would likely feel a lesser "debt of gratitude" to the party making the expenditures.

Lapse of time. Petitioner's theory is ultimately based on "human nature" (Br. 30), and it is human nature for election-generated emotions to fade over time, another circumstance that is present here. A party's expenditure made years before the adjudica-

tion of a case therefore could not be accorded the same value in calculating the judge's "debt of gratitude" as an equal expenditure made a few months before. Here, too, Amicus Conference of Chief Justices flags the problem but does not offer any solution, suggesting only that "the more remote in time the support was given, the less likely it is to create problems of a constitutional magnitude." CCJ Br. 27-28.

Voting record. In some cases, the judge has voted *against* a party that provided support during his campaign. Evidence that a judge did not seek to repay a "debt of gratitude" in other cases would have to be an important factor in the analysis, as amicus Conference of Chief Justices recognizes. CCJ Br. 28-29. That would be particularly true if the test focused, as petitioners propose, on probability of actual bias and if, as here, the judge had voted against the party in *several* other cases.

Importance of the expenditures. There will often be good reason to think that a judge would have won the election without regard to the supporter's expenditures. Here, for example, Benjamin was endorsed by virtually all the leading newspapers in the jurisdiction, and his opponent made serious blunders during the campaign. It would likely be "human nature" for a judge to feel less indebted to the financial supporter in these circumstances, and it would therefore be necessary to reduce the value assigned to the "debt of gratitude" accordingly.

c. As complex as these issues are, the discussion above still vastly understates the extent to which any "debt of gratitude" theory would be unworkable, because we have identified only some problems inherent in the theory's application to campaign ex-

penditures. As we have explained (see *supra* pp. 29-32), any theory based on an inference of probable bias cannot be limited to campaign expenditures (or even to elected judges), because many forms of influential support for a judge are non-financial. If petitioners' theory were adopted, therefore, courts would presumably have to devise separate tests to address whether each form of support was substantial enough to create a "debt of gratitude" that gave rise to a constitutionally disqualifying "probability of bias." For the support of a newspaper, for example, courts might take into account the circulation of the paper and whether the endorsement was unqualified. For the support of a politician, courts might consider how well-known the supporter was, how popular he or she was when the endorsement was made, and how strong the endorsement was. And so on. This is the antithesis of a workable constitutional standard.

3. A "debt of gratitude" theory would create administrative problems for courts.

Petitioners contend that, under their due-process standard, campaign expenditures will only rarely require recusal. But because their "vague and malleable standard" cannot identify where the constitutional line should be drawn in any particular case, it would almost certainly "open the gates for a flood of litigation." *Baze* v. *Rees*, 128 S. Ct. 1520, 1542 (2008) (Alito, J., concurring).[6]

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[6] States' own recusal provisions have not had this effect, because state courts have nearly uniformly held that campaign expenditures do not require disqualification under those provisions. See, *e.g.*, *Shepherdson*, 5 F. Supp. 2d at 310-311 (citing cases).

Resolving disqualification motions consumes scarce judicial time and resources. As courts have recognized, an increase in the number of such motions would interfere with "the conduct of judicial business" (*In re Petition to Recall Dunleavy*, 769 P.2d 1271, 1275 (Nev. 1988)), and make it more difficult to "carry[] out [courts'] essential responsibilities" (*Adair*, 709 N.W.2d at 581 (Taylor, C.J., and Markman, J.)). Apart from slowing the judicial process, petitioners' opaque standard seems bound to lead many judges to recuse themselves, either on motion or *sua sponte*, even where it might ultimately have been determined that recusal was not constitutionally necessary. Particularly in smaller districts, staffing problems would frequently result. See *Fieger*, 714 N.W.2d at 286 (Markman, J.). The potential for strategic contributions, made "for the purpose of obtaining a recusal" (*Shepherdson*, 5 F. Supp. 2d at 311), would only exacerbate these problems. And because the disqualification standard would rest upon federal constitutional law, States would be unable to rectify the problems by adopting bright-line rules legislatively. Constitutionalizing this area of the law would also lead parties in recusal fights to beat a path to this Court's door, thereby increasing the workload of this Court as well.

The abolition of judicial elections appears to be the ultimate goal of some of petitioners' amici. See, *e.g.*, Justice At Stake (JAS) Br. 3 (arguing that "judicial campaigns and elections" pose "serious threats to judicial impartiality"). But the vast majority of States elect their judges, and have done so since the middle of the 19th century. See *Repub. Party of Minn.* v. *White*, 536 U.S. 765, 785 (2002). Election of

state judges became popular because judges have the power to "'make' common law" and "shape the States' constitutions." *Id.* at 784. And it remains popular today: no State that elects its judges has ever entirely abandoned the system. See Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 523 (2005). Indeed, several States have rejected, by significant margins, referenda or proposed constitutional amendments that would have abolished judicial elections. See Roy Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L. J. 1077, 1082 (2007). West Virginia, in particular, has declined to alter its selection method. See, *e.g.*, Lawrence Messina, *State bar supports retention of partisan judicial elections*, CHARLESTON DAILY MAIL, 10/13/05, at 8A; Lawrence Messina, *W. Va. judiciary sticking with partisan elections*, ASSOC. PRESS, 12/3/08. While reasonable arguments can be made both for and against elected judiciaries, it is assuredly not the proper role of this Court to allow its resolution of the due-process issue presented here to be swayed by any distaste for judicial elections.

4. The broad constitutional rule advocated by petitioners is unnecessary.

A constitutional rule requiring disqualification whenever a judge can be deemed to have a sufficient "debt of gratitude" to a litigant cannot be justified as fulfilling an unmet need, because States are already addressing the issues that arise at the intersection of campaign finance and judicial disqualification. As Justice Kennedy has observed, "democracy" is its "own correctiv[e]." *Repub. Party of Minn.*, 536 U.S. at 795 (concurring opinion).

As an initial matter, the ABA Model Code's general disqualification rule, which requires recusal in any case in which "the judge's impartiality might reasonably be questioned," has been adopted in some form in virtually every State. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007); see ABA Br. 14 & n.29. A number of petitioners' amici express concern that judges do not always recuse themselves under state rules in circumstances in which they should. See ABA Br. 16-18; Br. of Brennan Ctr. 26-29. But the fact that one might disagree with a state judge's application of state law is obviously not a reason to invent a new rule of federal constitutional law, particularly in an area—the qualification of judges—that involves a core state function. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Indeed, if amici are concerned that state judges are failing to recuse themselves under state rules that require recusal, it is unclear why they believe that judges would be more likely to recuse themselves under a less stringent constitutional rule.

In any event, many States have enacted or are now considering reforms that will mitigate whatever recusal problems are perceived to exist. We mention several:

First, more than two-thirds of the States have contribution limits of some type. See American Judicature Society, *Judicial Campaigns and Elections*, *available at* http://tinyurl.com/a84fcf. One such State is West Virginia, which, after the 2004 election, extended the $1,000 limit on campaign contributions to include those made to 527 groups. See W. Va. Code § 3-8-12(g).

Second, a number of States now provide some form of public financing for judicial elections, and

still others, including West Virginia, have been considering such a system. See Opp. 25; JAS Br. 14-15.

Third, following the ABA's Model Code, at least two States have adopted disqualification provisions that require recusal if the judge received campaign contributions above a certain size from a party or lawyer. See Opp. 25 & n.10; JAS Br. 13-14.

Fourth, nearly half the States have "peremptory" recusal provisions that authorize parties to request the substitution of a judge without cause. See FLAMM, *supra*, § 26.1, at 753-56; *id.* § 27.1-.19, at 790-822; Schotland, *supra*, at 1102.

Fifth, States have contemplated altering recusal procedures in other respects. For example, West Virginia's Legislature recently proposed an amendment to the state constitution creating a judicial commission that would decide recusal requests. See H.R.J. Res. 104, 78th Leg., 2d Sess. (W. Va. 2008).

We note, in this connection, that the real concern of petitioners' amici may be that an "appeal based on state law issues" is generally unavailable when a member of a State's highest court denies a recusal motion. ABA Br. 16. Amici may therefore be seeking to constitutionalize recusal law to ensure at least the possibility of review by this Court. But the denial of a recusal motion by a Member of this Court is likewise unreviewable. In any event, if the absence of review in state courts is thought to be a problem, the solution is not to constitutionalize recusal law, but rather for States to amend their procedures. See FLAMM, *supra*, § 29.1-2, at 911-913 (describing available state procedures for resolution of recusal issues by full court).

These examples illustrate the array of tools at States' disposal; show that States have not been hesitant to use them; and demonstrate that there is no need for federal intervention. One set of petitioners' amici nevertheless urges this Court to adopt a broad constitutional rule to "inspire current state reformers to enact policies designed to restore the appearance and reality of * * * judicial independence." JAS Br. 9. The role of this Court, however, is to interpret the Constitution, not to "inspire" reformers to exercise their legislative responsibilities. In any event, as the multiple efforts already underway confirm, state reformers are adequately *self*-inspired.

C. There Is No Sufficient Probability Of Bias Here To Warrant Recusal Even Under Petitioners' Standard.

Even if one accepted the two foundational premises of petitioners' submission—that disqualification of a judge is constitutionally required when there is a "probability of bias," and that there is such a probability when the judge may feel a "debt of gratitude" to a litigant—Justice Benjamin's disqualification still would not be required. To establish that a judge is constitutionally barred from sitting, a party "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47. (In this regard, the Court will recall Justice Benjamin's statement while campaigning, welcoming support but warning that "if you want something in return, I'm not your candidate." JA319a.)

The "five reasons" identified by petitioners (Br. 27) do not rebut that presumption here. As we have already explained (see *supra* pp. 40-41), two of the factors on which petitioners rely—that the expenditures were made when an appeal was expected, and

that the decision to participate was not reviewed by the full court—do not make whatever "debt of gratitude" Justice Benjamin might have felt any greater than it would otherwise have been. See Br. 29-30.[7] That leaves the three other factors, all of which relate to the size of Blankenship's expenditures. See Br. 27-29.[8] When considered in light of all the circumstances, those expenditures did not create a constitutionally disqualifying "probability of bias" in favor of Massey's subsidiaries.

First, Justice Benjamin has voted against Massey or one of its subsidiaries in at least five other cases—twice on the merits and three times at the petition stage. See *supra* pp. 5-6, 9; see also JA674a n.29. In the most recent such case, Justice Benjamin voted to deny review of a $243 million judgment against Massey, which was nearly five times the amount at issue here. If Justice Benjamin feels a "debt of gratitude" to Blankenship, and for that reason harbors a "probability of bias" in favor of Massey

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[7] Nor is there warrant for any insinuation that the pendency of the litigation is in fact what motivated Blankenship's expenditures. See *supra* note 1.

[8] The third factor petitioners invoke—that Blankenship "actively campaigned for Justice Benjamin and solicited donations on his behalf" (Br. 29)—appears to be based on nothing more than a single "Dear Dr." letter from Blankenship that was appended to one of the disqualification motions (JA181a-182a). Petitioners identify no evidence to substantiate their assertion that the letters were "widely distributed" (Br. 7-8) and "directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee" (Br. 29), much less that Justice Benjamin was aware of it.

companies, he certainly has a strange way of showing it.[9]

Citing *Bracy* v. *Gramley*, 520 U.S. 899 (1997), a bribery case, petitioners point out that the votes in the other cases were not "outcome-determinative," and suggest that, through the "expedient" of voting against Massey in those cases, Justice Benjamin may have been seeking to "deflect suspicion" that he would cast the deciding vote in Massey's favor in this case, and thereby "immunize his actions." Br. 32-33. This slander is beyond reason. Petitioners' theory is that there was a "probability of bias" because it is "human nature" and "would only be natural" (Br. 30-31) for Justice Benjamin to feel a "debt of gratitude" to Blankenship. In attempting to deal with the problem (for that theory) that Justice Benjamin voted against Massey in several other cases, petitioners imply that Justice Benjamin was not merely "probably biased" but in fact dishonest—that he devised an elaborate scheme to vote one way in several other cases, regardless of the merits, to make it easier for him to vote the other way in another case to repay Blankenship without detection. Apart from the fact that there is not a shred of evidence to support the outlandish notion that Justice Benjamin is so devious, any such claim contradicts petitioners' conces-

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[9] The State of West Virginia does not seem to have shared petitioners' view as to the probability of bias. It was a party in at least two of those cases and did not seek Justice Benjamin's disqualification—despite the fact that it was opposing the Massey affiliate, and despite the fact that the State was represented by Attorney General McGraw, the brother of the candidate Blankenship so determinedly opposed. See JA675a n.31. Indeed, a state official involved in one of those cases said that she "would not have entertained" the idea of seeking Justice Benjamin's disqualification. *Ibid.*

sion in the court below that they were "[i]n no way * * * question[ing] Justice Benjamin's integrity." JA113a; see also JA108a.[10]

Second, virtually all the expenditures at issue were independent of Justice Benjamin's campaign. The only *direct* expenditure was a single campaign contribution of $1,000. JA208a. Approximately $500,000 went to advertising and mass mailings that Blankenship did not coordinate with the Benjamin campaign, and the balance was given to ASK, an independent 527 group that opposed Justice McGraw's reelection. JA187a-200a, 681a-684a.

Petitioners argue that "there is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because a majority of his financial support was provided through [ASK] * * * rather than directly." Br. 34. But there is every reason to believe that. It is a central premise of the law of campaign finance that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent * * * undermines the value of the expenditure to the candidate." *Buckley*, 424 U.S. at 47; see also *FEC* v. *Colorado*

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[10] Petitioners also challenge Justice Benjamin's integrity in another way: by asserting that he "disregard[ed] * * * longstanding procedures" and moved himself "ahead of Justice Albright in the order of succession to the chief justiceship." Br. 13 n.2. Petitioners' bizarre insinuation that Justice Benjamin conspired with certain of his colleagues to usurp normal procedures in order to enable him to appoint the replacements for the recused justices in this case is entirely baseless. The court changed the order of succession in October 2006 and November 2007, well before anyone had any idea that Chief Justice Maynard might recuse himself in this case, the circumstance that made Justice Benjamin Acting Chief Justice. Compare JA699a-700a, with Pet. Br. 12-13.

Repub. Fed. Campaign Comm., 533 U.S. 431, 446 (2001). At the same time, the absence of coordination "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. Thus, it is an accepted proposition that independent expenditures do not "pose[] the same risk of real or apparent corruption" as direct contributions. *McConnell* v. *FEC*, 540 U.S. 93, 121 (2003).

Third, the expenditures were not made by any party before the court. No Massey companies, including respondents, contributed to any candidate or group in the 2004 election (save for a single $1,000 contribution from A.T. Massey's PAC). Nor could they have, because West Virginia prohibits corporations from making campaign expenditures. W. Va. Code § 3-8-8(a). Instead, it was Blankenship, the CEO of Massey (respondents' ultimate parent) and of respondent A.T. Massey, who spent the money as part of an effort to unseat Justice McGraw. Blankenship did not make the expenditures on behalf of Massey or any of its subsidiaries; he did not make the expenditures in his capacity as CEO of Massey or A.T. Massey; and he did not use any money that belonged to a Massey entity.

Petitioners say that Justice Benjamin had an incentive to repay his "debt of gratitude" for Blankenship's own expenditures by voting in favor of Massey's subsidiaries, because Blankenship "holds more than 250,000 shares of the company's stock." Br. 33. What petitioners do not say is that those shares amount to an ownership interest of approximately 0.35%, giving him a $175,000 stake in the judgment. Compare Massey Energy Co., Quarterly Report (Form 10-Q) i (11/7/08) (85.1 million shares

outstanding), with Statement of Changes in Beneficial Ownership (Form 4) 1 (11/18/08) (296,935 shares owned by Blankenship). Given how small this was in relation to Blankenship's $3 million campaign expenditures, one can fairly infer that his motives were political rather than economic. Blankenship's stock holdings provide little basis for Justice Benjamin to "repay" any "debt" he supposedly felt to Blankenship.

Fourth, any "debt of gratitude" was greatly diminished by the fact that Justice Benjamin's election cannot be attributed primarily to Blankenship's financial support. For one thing, every major daily newspaper in West Virginia that made an endorsement, save one, endorsed Justice Benjamin. See JA674a n.27. To a large degree, moreover, Justice Benjamin's opponent cost himself the election. Justice McGraw was already a polarizing figure in West Virginia politics (see Juliet Terry, *Wheel of Justice*, STATE J., 12/10/04, at 1); his refusal to give interviews or debate Justice Benjamin before the election raised eyebrows (see Tom Diana, *Benjamin Vows Fairness on Supreme Court*, THE INTELLIGENCER (WV), 10/23/04); and a bizarre speech, in which McGraw accused Benjamin of trying to "destroy democracy" and claimed that this Court had "approved gay marriage," may well have tipped the balance (Justice Warren McGraw, Speech, Racine, WV (9/6/04), *available at* http://www.youtube.com/watch?v=TQ6nQaE2FM8; see JA678a & n.35). The speech was both widely disseminated and widely discussed, and many considered it to be the turning point in the election. See, *e.g.*, Brad McElhinny, *"Looking for Ugly" Campaign Ad Wins National Recognition*, CHARLESTON DAILY MAIL, 3/4/05, at 1A; see also JA678a-680a & nn.38-39. Justice Benjamin's largest

"debt of gratitude" may therefore have been to his opponent.

Petitioners do not dispute any of this (Br. 34-35), instead asserting that it "strains credulity" to suggest that Blankenship's financial support did not play a "meaningful role" in the election. Br. 35. That someone's support played a "meaningful role" in a judge's election, however, cannot be the constitutional standard. If it were, disqualification would be more the rule than the "exception[]." Br. 36.

Fifth, any "debt of gratitude" would have been further diminished by the fact that Blankenship's motivation was to defeat Justice McGraw, with Justice Benjamin being an incidental beneficiary. Blankenship believed that Justice McGraw's decisions harmed West Virginia's economy (see, *e.g.*, Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASHINGTON POST, 11/4/04, at A15), and that McGraw was "the most damaging to the state of any [person] who holds office" (Brad McElhinny, *Big-bucks backer felt he had to try*, CHARLESTON DAILY MAIL, 10/25/04, at 1A). The anti-McGraw—as opposed to pro-Benjamin—focus of Blankenship's efforts is confirmed by the fact that he sought to defeat Justice McGraw in the primary as well as the general election. See Jim Rowe, Pre-Primary Report, Schedule 1A (5/3/04) at 13, *available at* http://tinyurl.com/dzplud.

Sixth, a "debt of gratitude" will fade with time, and this case was decided several years after Justice Benjamin's election.

Seventh, there is no indication that Blankenship and Justice Benjamin even knew one another, before or after the election. Nor is there any indication that

Benjamin solicited or encouraged Blankenship's activities. The absence of any personal bond or solicitation reinforces the conclusion that the Justice would have had little reason to disregard the obligations of his office to favor respondents in this litigation.

Finally, it is notable that Justice Benjamin's disqualification would not have been required even under the ABA's Model Code provision addressing campaign expenditures. That provision requires disqualification when "a party, a party's lawyer, or the law firm of a party's lawyer has * * * made aggregate contributions to the judge's campaign" that are greater than some particular amount (unspecified in the rule). ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007). Blankenship is not a party or a lawyer for any party; and the expenditures at issue were not contributed to Justice Benjamin's campaign. It would be extraordinary if campaign expenditures required recusal under the Due Process Clause of the Fourteenth Amendment, which establishes only a "floor" (*Bracy*, 520 U.S. at 904), when they would not require recusal under the provision of a more stringent model code that was specifically designed to cover the subject.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted.

EVAN M. TAGER
DAN HIMMELFARB
JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 262-1910

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 825-2335

LEWIS F. POWELL III
RYAN A. SHORES
ROBERT W. LOFTIN
Hunton & Williams LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

D.C. OFFUTT, JR.
Offutt Nord, PLLC
P.O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

Counsel for Respondents

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REPLY BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

REPLY BRIEF FOR PETITIONERS

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Petitioners remains accurate.

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REPLY BRIEF FOR PETITIONERS

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That right requires not only "an absence of actual bias in the trial of cases," but also "prevent[s] even the *probability* of unfairness." *Id.* (emphasis added).

Massey contends that petitioners received all the due process to which they were constitutionally entitled despite the fact that the decisive vote in this case was cast by the beneficiary of $3 million in campaign support from the chairman and CEO of their adversary at the very time when their case was headed to that judge's court.

Massey dismisses the manifest probability that any jurist would have a difficult time being even-handed in the face of such immense and influential campaign support by asserting that bias is *never* a constitutional ground for recusal; that any such principle unaccompanied by a clear, bright line would be limitless and unmanageable; and that, in any event, the $3 million was expended by an individual who was not actually a party to the case, and not to elect Justice Benjamin, but to defeat his only opponent.

Each of Massey's three defenses evaporates when scrutinized. The notion that there is no due process right to an unbiased judge has been rejected repeatedly by this Court. *See, e.g.*, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997). Massey knows that to be the case because in its brief in opposition it explicitly acknowledged that "a judge cannot constitutionally hear a case where the judge . . . harbors some form of substantial actual bias." Br. in Opp.

15; *see also id.* at 16, 27, 30. Moreover, while the petition for certiorari was pending in this very case, but before it was granted, Massey filed its own petition in this Court seeking the recusal of another West Virginia Supreme Court justice on the ground that a "biased decisionmaker is 'constitutionally unacceptable.'" Pet. for Cert. 26, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 08-218 (cert. denied Dec. 1, 2008). Massey therefore cannot credibly maintain that bias is not a constitutionally compelled basis for judicial recusal.[1]

The absence of merit in Massey's absolutist position leads it to resort to a slippery-slope/parade-of-horribles argument. Massey contends that, unless there is a bright-line demarcation identifying when a judge may participate in a case where a litigant had a major and presumptively dispositive role in bankrolling his election, a constitutional recusal standard will be limitless and unworkable, and therefore does not exist. But those arguments are equally unavailing. The Court regularly establishes case-by-case

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[1] Massey's assertion that the writ of certiorari should be dismissed as improvidently granted because *petitioners'* due process arguments have shifted is therefore surpassingly ironic—and completely unfounded. Petitioners' arguments have remained consistent throughout this litigation. *Compare* Pet. for Cert. 16-17 ("Because of the substantial risk of actual bias created by Mr. Blankenship's extraordinary level of financial support for Justice Benjamin's campaign . . . , the Constitution required Justice Benjamin to recuse himself from Massey's appeal."), *with* Pet. Br. 18 ("Where, as here, the 'appearance of bias' is serious enough to create a 'probability' that the judge is actually biased against a litigant, due process requires the judge's recusal."). The Question Presented is whether due process required recusal due to Mr. Blankenship's financial support for Justice Benjamin's election—the precise issue discussed in petitioners' briefs.

constitutional standards in due process, equal protection, reasonable search and seizure, and comparable constitutional cases because no one bright line can ever be articulated to define every condition where such constitutional standards may come into play. Indeed, in this very field, the Court has explained that a disqualifying interest "cannot be defined with precision," but that a "reasonable formulation" is whether the circumstances would make it difficult for a judge to "hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (internal quotation marks omitted). The Conference of Chief Justices has made clear in its brief that the courts that would be affected more than any others by the resolution petitioners seek in this case would welcome that result and that a case-by-case constitutional inquiry would not precipitate the deluge of recusal requests that Massey has imagined. CCJ Br. 4, 23.

The foregoing formulation, endorsed repeatedly by this Court, cries out for application here. Massey argues that Mr. Blankenship's generous checkbook could not have had any impact on Justice Benjamin's objectivity in this case because Mr. Blankenship was not himself a party. But that proposition is difficult to take seriously since Mr. Blankenship was not only Massey's chairman and CEO but also the principal figure in the events that gave rise to the jury's $50 million verdict against his company. Without Mr. Blankenship and his efforts to do what the jury found to be fraudulent and outrageous, this case would not exist. Of course he wanted his case to be decided by the jurist of his choosing.

And the notion that Mr. Blankenship's pervasive involvement in Justice Benjamin's election was less influential because Mr. Blankenship purportedly

used his funds to undermine Justice Benjamin's opponent rather than to promote Justice Benjamin (which is demonstrably untrue) is simply not sustainable. Mr. Blankenship wanted to unseat a judge whom he perceived to be unfavorable to his case and to replace him with a more congenial jurist. So he spent his money to advance precisely that goal in every way he could—support for the candidate he liked *and* opposition to the candidate he feared.

If, as this Court has said, "justice must satisfy the appearance of justice" (*Murchison*, 349 U.S. at 136 (internal quotation marks omitted)), and if a litigant need not definitively prove, as rarely could be proved, actual bias to disqualify a judge, then surely the overwhelming showing in this case of circumstances that would lead virtually any objective observer to perceive the probability of bias decisively fails that constitutional standard.

I. DUE PROCESS REQUIRED JUSTICE BENJAMIN TO RECUSE HIMSELF FROM MASSEY'S APPEAL.

Massey's defense of Justice Benjamin's participation in this case rests upon a misreading of this Court's due process jurisprudence and a futile effort to dispel the taint of judicial bias generated by Mr. Blankenship's extraordinary campaign support for Justice Benjamin.

A. Due Process Requires Recusal Where There Is A Probability Of Judicial Bias.

The latest iteration of Massey's due process theory is even narrower than Justice Benjamin's reading of the Due Process Clause. Justice Benjamin at least concedes that judicial bias can require recusal in some cases (while incorrectly demanding conclu-

sive proof of actual bias as a prerequisite to recusal). J.A. 662a. Massey goes further, however, arguing that "[t]his Court's due-process decisions . . . apply exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit," and "do not recognize 'bias' . . . as a general ground for disqualification." Resp. Br. 19 (internal quotation marks omitted). Thus, according to Massey, due process *never* requires an elected judge to recuse himself from a campaign supporter's case—no matter how much money that supporter gave to the judge's campaign, irrespective of the proportion of overall campaign support for which the supporter was personally responsible, and regardless of the timing of that support. Massey's characterization of this Court's recusal jurisprudence is simply not accurate.

1. Massey's defense of Justice Benjamin places dispositive weight on common-law recusal practice. Because there were no judicial elections at common law, however, common-law practice cannot itself resolve whether due process requires the recusal of an elected judge who has benefited from a litigant's manifestly decisive financial influence. Common-law recusal principles must instead be applied to modern-day judicial elections. *Cf. Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996) ("Where there is no exact antecedent" in the Seventh Amendment context, "the best hope lies in comparing the modern practice to earlier ones . . . , seeking the best analogy we can draw between an old and the new.") (citations omitted).

At common law, judges with a direct financial interest in the outcome of a case were required to recuse themselves because that interest "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" be-

tween the parties. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In the context of today's judicial elections, this common-law principle would mandate recusal when a litigant's campaign support for an elected judge provides a "temptation" to tip the judicial "balance" in favor of a financial sponsor. Although not all financial support provides a judge with such a "temptation," a judge who received $3 million (more than 60% of his total campaign support) from a single litigant may well be "tempt[ed]," perhaps unconsciously, to decide the case in that litigant's favor—in order to assist his financial benefactor and preserve the possibility of future campaign support—just as a judge with a direct financial interest in a case may be tempted to rule in a manner consistent with that interest.

In any event, this Court has never intimated that the due process guarantee of a "neutral" judge is defined exclusively by the contours of common-law recusal doctrine. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, in many respects, due process imposes more extensive recusal requirements than the common law. Most significantly, this Court has held that due process requires recusal not only where a direct pecuniary interest in a case provides a judge with a "possible temptation" to tip the judicial "balance," but also where a judge has an indirect financial interest that could potentially be affected by a case's outcome (*Lavoie*, 475 U.S. at 824), and where other, nonpecuniary interests generate a "probability of actual bias on the part of the judge." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Bracy*, 520 U.S. at 904-05 ("the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of

his particular case") (internal quotation marks and citation omitted). These disqualifying interests can be identified only by "consider[ing]" the "[c]ircumstances and relationships" peculiar to each case. *Murchison*, 349 U.S. at 136.[2]

In *Johnson v. Mississippi*, for example, the Court held that a judge who had been sued by a criminal defendant in a civil-rights action was constitutionally barred from presiding over the defendant's contempt proceeding. 403 U.S. at 215. The Court explained that the judge was "so enmeshed in matters involving [the defendant] as to make it most appropriate for another judge to sit" because "[t]rial before an unbiased judge is essential to due process." *Id.* at 215-16 (internal quotation marks omitted); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (recusal was constitutionally required where a judge had been verbally abused by a criminal defendant because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication"); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (same).

Massey asserts that these decisions mandating recusal on nonpecuniary grounds "are limited to the specific context of contempt and lack applicability to

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[2] In other respects, the common law's recusal requirements were actually broader than the requirements of due process. At common law, "the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide"—such as residence in a town whose tax base could have been affected by a decision—"rendered the decision voidable." *Tumey*, 273 U.S. at 524, 526. But this Court has "declinc[d] to . . . constitutionaliz[e] any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a violation of the Due Process Clause." *Lavoie*, 475 U.S. at 825 n.3.

an ordinary civil or criminal case." Resp. Br. 22. But Massey is unable—and, indeed, does not even attempt—to explain why judicial bias, or the inability to maintain judicial detachment, would be a ground for recusal in contempt cases but not in other settings. A "fair trial in a fair tribunal" is not a constitutional imperative only for those being prosecuted for contempt. In any event, Massey's effort to carve out a special set of constitutional recusal rules for contempt cases fails because the Court has explicitly held in cases outside the contempt context that due process requires recusal based on judicial bias.

In *Ward v. Village of Monroeville*, the Court held that a village mayor was constitutionally required to recuse himself from a trial because the mayor was responsible for the village's finances, which depended to a significant extent upon the fines levied in such proceedings. 409 U.S. at 60. Unlike in *Tumey v. Ohio*, this mayor did not have a "direct, personal, substantial, pecuniary interest" (273 U.S. at 523) in the outcome of the case because he would not have personally received a portion of the fines assessed against the criminal defendant. *Ward*, 409 U.S. at 60. The Court nevertheless held that due process prohibited the mayor from presiding over the criminal trial because a "possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . . may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.*

Similarly, in *Bracy v. Gramley*, the Court held that it would violate due process if a judge who regularly accepted bribes from criminal defendants had attempted to facilitate the conviction of a defendant

who had not bribed him in order to deflect attention away from his pro-defendant rulings in other cases. 520 U.S. at 905. According to the Court, "there is no question that, if it could be proved, such compensatory, camouflaging bias on [the judge's] part in [the defendant's] own case would violate the Due Process Clause of the Fourteenth Amendment." *Id.*

2. Of course, it would typically be difficult to present definitive proof that a judge harbored an actual bias against a litigant—especially because, "[i]n a [recusal] motion . . . , there is not apt to be anything akin to the 'record' that supplies the factual basis for adjudication in most litigated matters." *Laird v. Tatum*, 409 U.S. 824, 824 n.1 (1972) (Rehnquist, J.). For that reason and others, in considering a due-process-based recusal request, a court is "not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Lavoie*, 475 U.S. at 813 (internal quotation marks omitted; first and second alterations added). Where that "possible temptation" is strong enough to create a "probability of actual bias on the part of the judge" (*Withrow*, 421 U.S. at 47) or a "probability of unfairness" to one of the litigants (*Murchison*, 349 U.S. at 136), then due process requires recusal even if the judge "would do [his] very best to weigh the scales of justice equally between contending parties." *Id.* This "neutrality requirement"—which "has been jealously guarded by this Court"—"helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

B. Blankenship's Pervasive And Overwhelming Campaign Support Would Lead A Reasonable Observer To Perceive A Probable Bias By Justice Benjamin In Adjudicating His Benefactor's Case.

Massey argues that "there is no sufficient probability of bias here to warrant recusal" even under the due process recusal standard advanced by petitioners (and compelled by this Court's precedent). Resp. Br. 49 (capitalization altered). Massey's defense of Justice Benjamin is utterly unpersuasive because, "under a realistic appraisal of psychological tendencies and human weakness," permitting a judge to decide an appeal with profound personal and professional consequences for his principal financial benefactor "poses such a risk of actual bias . . . that the practice must be forbidden" to "implement[ ]" the "guarantee of due process." *Withrow*, 421 U.S. at 47.

Massey contends that this "risk of actual bias" on Justice Benjamin's part should be excused because he has also voted against Massey in several other cases. Resp. Br. 50. But when petitioners initially moved for Justice Benjamin's recusal—the relevant time period for evaluating whether due process required him to step aside—he had only voted against Massey in a single case, where the state supreme court had unanimously denied a Massey petition for appeal. *See McNeely v. Indep. Coal Co.*, No. 042156 (W. Va. review denied Feb. 9, 2005). And neither Massey nor Justice Benjamin identifies a single case (either before *or* after petitioners first moved for recusal) where Justice Benjamin has cast an outcome-determinative vote against Massey. In every instance cited, at least three of the four other justices

on the West Virginia Supreme Court also voted against Massey. *See* J.A. 674a n.29; Pet. Br. 32 n.5.

In any event, even if Justice Benjamin had cast a deciding vote against Massey in another case, it would not diminish the likelihood of bias in favor of Massey in *this* case, where he was asked to review a $50 million verdict against Massey that was premised on conduct orchestrated by his financial benefactor (J.A. 63a-65a), and which was heading for an appeal to the West Virginia Supreme Court precisely when Mr. Blankenship set out to secure Justice Benjamin a seat on that court. Given Mr. Blankenship's central role in Massey's dealings with petitioners (for which he was answerable to Massey's board and shareholders) and his substantial stockholdings in Massey (which had lost 16% of their value the day after the verdict (*see infra* note 3)), the stakes for Mr. Blankenship could hardly have been higher. The "possible temptation" for Justice Benjamin to tip the balance toward Mr. Blankenship—in order to make his extraordinary campaign support worthwhile and "maintain th[at] high level of contribution" in future election campaigns (*Ward*, 409 U.S. at 60)—would have been acute. *Tumey*, 273 U.S. at 532.[3]

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[3] Mr. Blankenship's financial interest in the outcome of this case went well beyond his "$175,000 stake in the judgment"—a calculation that Massey bases solely upon the size of the verdict and the fact that Mr. Blankenship held 0.35% of Massey's outstanding stock. Resp. Br. 53. In fact, Mr. Blankenship stood to lose much more than just his proportionate share of the judgment. Mr. Blankenship could have lost millions of dollars in investments if his 296,000 shares of Massey's stock decreased in value as a result of an appellate decision upholding the jury's verdict. Indeed, on the first day of trading after the verdict (which was returned after trading hours), Massey's shares lost 15.8% of their value. And Mr. Blankenship stood to lose mil-

Massey suggests that the probability of judicial bias was diminished by the fact that the vast majority of Mr. Blankenship's support for Justice Benjamin's campaign was provided through independent expenditures, rather than direct campaign contributions. But whether or not "independent expenditures . . . 'pose[] the same risk of real or apparent corruption' as direct contributions" (Resp. Br. 53 (brackets in original)), due process demands more of judges than the mere avoidance of *corruption*. In the judicial setting, prohibiting "*quid pro quo* corruption between a candidate and a contributor" is not enough. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981) (internal quotation marks omitted). Due process demands a "neutral" judge (*Ward*, 409 U.S. at 62) who will "apply the law to [each litigant] in the same way he applies it to any other party." *Republican Party v. White*, 536 U.S. 765, 776 (2002). Thus, while "mere . . . favoritism or opportunity for influence alone is insufficient to justify regulation" of campaign support in legislative and executive branch races (*McConnell v. FEC*, 540 U.S. 93, 153 (2003)), comparable "favoritism" toward a judicial campaign supporter is constitutionally intolerable. Due process does not permit a judge to sit in a case where he is "predisposed to find against" one of the litigants before him. *Marshall*, 446 U.S. at 242.

Here, there can be little doubt that Mr. Blankenship's financial dominance in his election made a profound impression on Justice Benjamin. The $3 million that Mr. Blankenship spent on the

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[Footnote continued from previous page]

lions more in compensation if Massey's board and shareholders disapproved of his intentionally tortious and fraudulent conduct found by the jury.

campaign was three times the amount raised by Justice Benjamin's own campaign committee, and unquestionably improved the election prospects of this then-unknown private attorney. While Massey contends that the probability of judicial bias is reduced because factors other than Mr. Blankenship's financial support had some role in Justice Benjamin's electoral success (Resp. Br. 55), it defies reality to suggest that the hundreds of television and print advertisements in West Virginia funded by Mr. Blankenship did not contribute materially and substantially to Justice Benjamin's narrow victory over Justice McGraw.

Justice Benjamin's tendency to feel "predisposed" toward—and "indebted" to (*White*, 536 U.S. at 790 (O'Connor, J., concurring))—his financial benefactor would hardly have been diminished if, as Massey claims, Mr. Blankenship had provided his support "to defeat Justice McGraw," rather than to elect Justice Benjamin. Resp. Br. 55. In their two-man race, every dollar spent to oppose Justice McGraw was a dollar spent to elect Justice Benjamin. In any event, contrary to the impression advanced by Massey, Mr. Blankenship made more than $500,000 in independent expenditures that he reported to election officials as "*[s]upport [for the] candidacy of Brent Benjamin*" (J.A. 184a (emphasis added); *see also id.* at 188a), and the nearly $2.5 million that he donated to And For The Sake Of The Kids funded advertisements that not only attacked Justice Benjamin's sole general election opponent, but also expressly endorsed Justice Benjamin. *See id.* at 304a ("Please vote Brent Benjamin for Supreme Court.").

Finally, Massey argues that "this case was decided several years after Justice Benjamin's election." Resp. Br. 55. Although the probability of judi-

cial bias in favor of a campaign supporter may diminish with time in some circumstances, here Mr. Blankenship provided his support for Justice Benjamin quite soon after he had publicly vowed to appeal this multimillion-dollar case to the West Virginia Supreme Court. J.A. 115a. And the fact that this case took so long from verdict to appellate decision involved several factors that enhance, rather than diminish, the due process implications raised by this case. J.A. 447a (recusal of Chief Justice Maynard); W. Va. S. Ct. D.E. 78, 86 (orders of Justice Benjamin appointing judges to replace Chief Justice Maynard and Justice Starcher). The entire sequence of events creates a strong inference that Mr. Blankenship set out to change the composition of the West Virginia Supreme Court in order to improve his company's chances of success in this very case, and heightens the concern over the probable bias of the judge who Mr. Blankenship helped to install on the court that would decide his $50 million case.[4]

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[4] Massey's assertion (at 55) that "there is no indication that Blankenship and Justice Benjamin even knew one another" may be mistaken. *See* Paul J. Nyden, *Massey Fights Order to Raise Court Deposit*, Sunday Gazette Mail (Charleston), Apr. 9, 2006, at 5B (reporting on Mr. Blankenship's March 2006 dinner with Justices Benjamin and Maynard). However, the basis for recusal is not personal friendship, but the great lengths to which Mr. Blankenship went to secure Justice Benjamin's seat on the state supreme court.

II. The Due Process Right To A Fair Tribunal Free From Bias Due To The Influence Of Extraordinary Election Spending Does Not Present Problems Of Judicial Administration.

Massey ultimately retreats to a parade of horribles to defend Justice Benjamin's refusal to recuse himself from participation in this case. But Massey's unsubstantiated speculation cannot diminish the serious constitutional deficiencies in the proceedings below.

A. A Decision Requiring Justice Benjamin To Recuse Himself Would Not Unsettle Existing Recusal Standards Or Generate A Flood Of New Recusal Requests.

Massey asserts that requiring Justice Benjamin's recusal in this case would generate an avalanche of constitutionally mandated recusals in cases outside of the campaign-finance context. Massey suggests, for example, that if Mr. Blankenship's campaign support for Justice Benjamin created a constitutionally unacceptable probability of bias, then Justices of this Court would be required to recuse themselves in every case of importance to the President who nominated them. Resp. Br. 32.

That contention is meritless. In order for this Court to discharge its constitutional "duty . . . to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), it is both necessary and appropriate for Justices routinely to decide cases that are important to the Presidents who nominated them (and to the Senators who confirmed them). Indeed, Chief Justice Jay—one of the authors of *The Federalist*—and Chief Justice Ellsworth and Justices

Blair, Paterson, and Wilson—each of whom participated in the Constitutional Convention—regularly sat in cases that had profound implications for both President Washington and the United States Senate. *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (federal court jurisdiction over suits against States); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (constitutionality of federal carriage tax). In condoning this practice, the Framers reached the eminently reasonable conclusion that a Justice's life tenure and salary protections are sufficient to neutralize any appreciable risk of judicial bias in favor of the President and Senators responsible for a Justice's appointment. Judges continue to echo that conclusion today. *See In re Executive Office of the President*, 215 F.3d 25, 25 (D.C. Cir. 2000) (Tatel, J.) ("Hearing a case involving the conduct of the President who appointed me will not create in reasonable minds . . . a perception that [my] ability to carry out judicial responsibilities with integrity, impartiality, and competence [would be] impaired.") (internal quotation marks omitted; brackets in original).

Indeed, federal judges' recusal determinations are already governed by a federal statute that requires recusal whenever a judge's "impartiality might reasonably be questioned" (28 U.S.C. § 455(a))—a standard that encompasses any instance in which there is a reasonable basis to conclude that a judge is biased for or against one of the parties. *Liteky v. United States*, 510 U.S. 540, 548 (1994). This statutory standard establishes a lower threshold for recusal than the Due Process Clause, which, in this context, requires recusal only where the appearance of partiality is so strong as to create a probability of bias. Reaffirming that due process mandates recusal where there is a probability of ju-

dicial bias will thus have no impact on federal judges' recusal obligations.

Nor will it constitutionalize large swaths of state recusal law, as virtually all States have recusal requirements more stringent than the due process standard here. ABA Br. 14 n.29. Indeed, a decision holding that the Due Process Clause requires the recusal of judges who, more probably than not, are biased against a party would leave States free—as they have always been—to "adopt recusal standards more rigorous than due process requires" (*White*, 536 U.S. at 794 (Kennedy, J., concurring)) and free to experiment with different modes of selecting judges, including judicial elections. But States may not, consistent with the federal guarantee of due process, condone decision-making by judges tainted by a probability of bias. As this Court has recognized, this constitutional floor is necessary because state-law recusal standards all too often "protect[ ] too little" (*Ward*, 409 U.S. at 61), and because federal protection is necessary where state judges' actual judicial recusal decisions fail to satisfy the constitutional minimum. Indeed, the Court has never declined to enforce a fundamental federal right—such as the right to "[t]rial before 'an unbiased judge'" (*Johnson*, 403 U.S. at 216)—simply because state law provides its own set of procedural safeguards.

Amicus Conference of Chief Justices—a body that comprises the chief justices and chief judges of every State—agrees with petitioners that "the due-process guarantee . . . protects the right to a fair hearing if extreme facts create a 'probability of actual bias . . . too high to be constitutionally tolerable'" and "may require the disqualification of a judge in a particular matter because of extraordinarily out-of-

line campaign support." CCJ Br. 4 (second alteration in original).

Alabama and six other States dissent from the adoption of this constitutional minimum because, in their view, enforcing this constitutional guarantee would interfere with their efforts to "experiment[ ] with different—and often novel—ways of ensuring the impartiality of their own judges." Alabama Br. 17. But that is manifestly not the case, and, apparently, the *forty-three* States that did not join that *amicus* brief do not share Alabama's desire to be free to experiment with reductions below the constitutional floor. And with good reason. The States may be the laboratories of democracy, but their constitutional prerogatives have never encompassed the authority to reduce constitutional minimums—not, at least, since the Fourteenth Amendment was ratified. While the States are free to craft different procedures to enforce federal rights, the States may not simply disregard them. The States' discretion to design their own judicial-selection and recusal procedures thus does not include the right to condone proceedings before a judge who is "predisposed to find against" one of the parties. *Marshall*, 446 U.S. at 242.

Massey also predicts that mandating recusal based on a probability of judicial bias would generate a flood of new recusal motions. Resp. Br. 44; Alabama Br. 28. But the Conference of Chief Justices—whose members would bear the brunt of any increase in recusal requests—categorically dismisses Massey's speculation as "unfounded." CCJ Br. 23. Indeed, judicial bias has long been a ground for recusal under this Court's due process jurisprudence and federal and state recusal statutes, and there is no evidence that courts are inundated by bias-based

recusal requests. Even in Oklahoma, where the state supreme court has held that due process requires the recusal of a judge who has received as little as $5,000 in campaign donations from a party's attorney (*Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001)), the apocalypse predicted by Massey has not materialized.

B. The Due Process Right To An Unbiased Judge Is Not Dependent On The Existence Of A Bright-Line Rule.

Massey also suggests that this Court should decline to enforce the Due Process Clause's guarantee of an unbiased judge because there is no bright line that identifies with precision every set of circumstances in which a litigant's campaign support for a judge mandates recusal. Resp. Br. 36. But the absence of a bright line between the constitutional and the unconstitutional is a common feature of this Court's due process jurisprudence, which is "flexible and call[s] for such procedural protections as the particular situation demands." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and brackets omitted). By its "very nature," then, the phrase "due process negates any concept of rigid procedures universally applicable to every imaginable situation." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("identification of the specific dictates of due process generally requires consideration of three distinct factors" applied to the particular facts of each case).

This Court has already said that the factors that would disqualify a judge from sitting "cannot be defined with precision." *Lavoie*, 475 U.S. at 822. But

that condition has never deterred the Court from enforcing the Constitution's broad guarantee of liberty.

The "flexib[ility]" of due process is particularly well-suited to the review of judicial campaign support because case-specific considerations—such as the amount of a litigant's campaign expenditures; the proportion of overall financial support for which the litigant was responsible; the litigant's provision of other, nonfinancial support for the campaign; and the timing of the litigant's support—will determine whether a litigant's support for a judge creates a probability of bias in favor of the supporter. As the Conference of Chief Justices recognizes, "no bright-line rule can or should be attempted" in this area because "the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case." CCJ Br. 22. A litigant's $50,000 donation may not require recusal, for example, where it constitutes only a small fraction of the total campaign support for a judge and was donated years before the litigant's case began, but may require recusal where it represents 75% of the judge's total support, was made while the case was pending, and had an outcome-determinative effect on the election.

There is no reason to believe that the state courts on which the Conference's members sit—as well as the lower state courts that they oversee—will be unable to undertake such case-by-case recusal evaluations using the constitutionally pertinent factors identified by the Court in this case. Indeed, state courts perform similar fact-specific constitutional inquiries every time they are asked by a criminal defendant to determine whether a search or seizure was "unreasonable." *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("we have consistently eschewed bright-

line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry").

No one could credibly contend that the Court should stop enforcing the Fourth Amendment because it is impossible to draw a bright line between reasonable and unreasonable searches. It is no less implausible to suggest that this Court should refuse to apply the Due Process Clause in this case simply because there is no bright line that can identify in advance every set of facts in which a litigant's campaign support will mandate a judge's recusal.

The "bright line" alternative that Massey suggests—that the Due Process Clause *never* requires a judge's recusal no matter the size, proportion, or timing of a litigant's campaign support—"is not worth the downside." *Roell v. Withrow*, 538 U.S. 580, 590 (2003).

* * *

The "Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall*, 446 U.S. at 242. This "guarantee of a fair and meaningful proceeding" is fundamentally incompatible with judicial bias (*id.* at 250)—whether that bias is born of a judge's pecuniary interest in the outcome of a case, a judge's personal animus toward a particular litigant in a contempt proceeding, or a litigant's expenditure of millions of dollars to support a judge's election and defeat a judge's opponent. Where the size, proportion, and timing of that campaign support create an objective probability that the judge would be predisposed in favor of one party and against another, due process requires the judge's recusal. The "constitutional interest in fair adjudicative procedure" demands no less. *Id.* at 243.

CONCLUSION

Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

SUPPLEMENTAL BRIEF FOR PETITIONERS

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Four months after the West Virginia Supreme Court of Appeals released its 3-2 opinion overturning the $50 million verdict in favor of petitioners—and nearly a month after the petition for a writ of certiorari was filed in this Court—Justice Brent Benjamin issued a lengthy concurring opinion defending his decision to participate in the appeal of his principal financial supporter. That concurring opinion—which is reproduced in the appendix to this Supplemental Brief—underscores the conflict between Justice Benjamin's decision not to recuse himself and the due process precedent of both this Court and a number of lower courts. Far from dispelling the constitutional concerns generated by his participation in this case, Justice Benjamin's concurring opinion reinforces the compelling need for this Court to clarify when the Constitution requires the recusal of a judge who has benefited from a litigant's substantial campaign expenditures.

In his concurring opinion, Justice Benjamin insists that his "participation herein was wholly consistent with due process." Supp. App. 23a. Justice Benjamin's contention that due process did not require recusal—notwithstanding the more than $3 million that Massey's CEO spent supporting his judicial election campaign—rests upon his belief that "[d]ue process . . . requires recusal *only* in those rare cases wherein a judge or justice has a 'direct, personal, substantial [or] pecuniary interest' in the outcome of the case." *Id.* at 28a (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986)) (second brackets in original; emphasis added).

Justice Benjamin categorically asserts that an appearance of impropriety generated by a judge's participation in a case can *never* be so serious as to require recusal under the Due Process Clause. *See* Supp. App. 23a n.14 ("it is an extraordinary and unprecedented argument which contends that '*apparent* conflicts' alone can have such an effect on the outcome of a case that due process considerations are implicated") (emphasis in original); *id.* at 27a (the "due process 'floor' is 'a "fair trial in a fair tribunal," before a judge with no *actual* bias against the defendant *or interest in the outcome of* his particular case'") (quoting *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)) (emphasis added by Justice Benjamin). According to Justice Benjamin, the "very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process." *Id.* at 21a n.12.

Justice Benjamin's uncompromising position that due process *never* requires recusal based on an appearance of impropriety is squarely at odds with this Court's precedent. Indeed, this Court has explained that, "even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) ("any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). This Court has accordingly concluded on multiple occasions that due process required a judge's recusal, despite the absence of evidence of *actual* bias on the part of the judge. *See, e.g.*, *In re Murchison*, 349 U.S. 133, 137 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

This "stringent rule" mandating recusal based on an appearance of impropriety is constitutionally required because "our system of law has always endeavored to prevent even the *probability* of unfairness." *Murchison*, 349 U.S. at 136 (emphasis added). Justice Benjamin, in contrast, is prepared to tolerate even a substantial probability of judicial bias where the aggrieved party is unable to prove that the judge was actually biased.*

Justice Benjamin is far from the only lower-court judge to deny a recusal motion based on the conclusion that "appearances . . . should never alone serve as the basis for a due process challenge" to a judge's participation in a case. Supp. App. 23a n.14. At least five state supreme courts agree with Justice Benjamin that recusal is constitutionally required only where there is proof that a judge is actually biased. *See* Pet. 22-23 & n.7 (citing cases). Those decisions directly conflict with a long line of lower-court cases recognizing that due process requires the recusal of a judge tainted by an appearance of impropriety. *Id.* at 22 & n.6 (citing cases). These divergent due process standards reinforce the need for this Court to grant certiorari and explicitly reject the

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* Such an actual bias standard would provide scant protection for litigants' due process rights. Indeed, only in the most exceptional circumstances is there concrete evidence available to demonstrate that a judge is *actually* biased against a litigant. In the absence of such evidence, a judge harboring bias against a litigant would be able to participate in a case by simply denying the existence of that bias—even where the facts created an overwhelming appearance of impropriety. For that reason, this Court has never required evidentiary confirmation of actual bias when determining whether due process mandated a judge's recusal. *See, e.g.*, *Murchison*, 349 U.S. at 137; *Mayberry*, 400 U.S. at 465.

artificially narrow conception of due process endorsed by Justice Benjamin.

Indeed, Justice Benjamin has it precisely backward when he suggests that "an appearance-driven due process standard for disqualification" would have an "incalculable" and "long-lasting negative effect on public confidence in our courts." Supp. App. 29a. As evidenced by the diverse group of *amici* supporting the petition for certiorari and the extensive public attention generated by this case (*see* Pet. 12-13), it is a judge's insistence on participating in a case when tainted by an unavoidable appearance of impropriety—not the application of the Due Process Clause's fundamental procedural protections to ensure a fair hearing for all litigants—that profoundly undermines "public confidence in our courts" and the judges who preside over them.

This Court's review is necessary to restore public confidence in state courts inundated by staggering financial contributions to judges who insist on deciding their financial supporters' cases in the absence of evidentiary proof of actual bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID B. FAWCETT
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Center
20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

BRUCE E. STANLEY
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

ROBERT V. BERTHOLD, JR.
BERTHOLD, TIANO & O'DELL
208 Capitol Street
Charleston, WV 25301
(304) 345-5700

Counsel for Petitioners

August 15, 2008

APPENDIX

No. 33350 *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

Benjamin, Acting C.J., concurring:

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Rory L. Perry II, Clerk
Supreme Court of Appeals
of West Virginia

Roscoe Pound offered the following pertinent comments as to a judge's responsibility when setting forth an opinion:

> The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953). There is an important difference between a thoughtful, well-reasoned separate opinion or order and one which is grounded in the political manipulation of legal doctrine; and in the case of ensuring a stable, predictable and fair judicial system, that difference matters. Judges who use their opinions and orders simply as sensationalistic bombast by which to convey partisan agendas or who pander to emotion

rather than legal reason do a disservice to the rule of law and to the institution they serve.

It is a testament to the strength of our justice system that judges may disagree and do so openly in separate opinions. A well-reasoned and legally sound separate opinion carries with it the opportunity for pointing out differences with the opinions of the other members of the court without undermining public confidence in the judiciary. Hon. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U.L. Rev. 1185, 1196 (1992). By furthering positive progress in the development of law, a well-honed opinion serves as an invaluable instructional tool to judges, lawyers, legal scholars, law students and even to a judge's colleagues. "[T]he effective judge . . . strives to persuade, and not to pontificate. [He] speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against . . . [his] own colleagues." *Id.* at 1186 (internal quotations omitted). A separate opinion should never "generate more heat than light," but rather should "'stand on its own footing,' . . . spell[ing] out differences without jeopardizing collegiality or public respect for and confidence in the judiciary." *Id.* at 1194, 1196 (internal quotations omitted).

If the touchstone of a judicial system's fairness is *actual* justice, which I believe it is, its legitimacy is measured in actualities, not in the manipulation of appearances or the vagaries of sensationalism.[1] Ac-

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[1] As a basic premise of this concurrence, I submit that the goal of any legitimate judicial system is actual justice. Actual justice presupposes stability and predictability in the judicial system by the measured application of the rule of law. Actual justice is not measured by whether the end-result of the case,

tual justice derives from actual impartiality in decision making and is conveyed in well-written *legal* opinions which are founded in the rule of law – not in orders, opinions or public pronouncements by judicial officers reflecting partisanship, contempt for other members of this Court, or their staff, bias toward or against the parties, or a pre-judging of the issues.[2]

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i.e., who wins and who loses, meets with the acceptance of partisan constituencies or those with vested interests in specific outcomes in given cases. Rather, it is justice firmly rooted in the rule of law. Appearance or politically-driven judging is subject to the manipulation of information and opinion via innuendo, half-truths, suggestive claims, and so on. Such judging is contrary to a judge's duty to resist public clamor and fear of criticism. W. Va. Rules of Judicial Conduct, Canon 3B(2) ("A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.").

2 The politicization of one's judicial office is perhaps the gravest threat to the independence of the judiciary, because the use of one's judicial office for partisan purposes utterly destroys the impartiality and fairness which is necessary for actual justice. A judicial officer's public actions in ridiculing selected litigants or fellow jurists, particularly during the pendency of a case or an election, necessarily conveys to the public a fundamental bias within the Court incompatible with fairness. The notion of "political" or "appearance-driven" justice in West Virginia conveys the message that appearances and rhetoric –particularly when contrived – mean more than actualities, that the manipulation of facts is more important than the facts themselves, that cases are decided to a predetermined politically-correct result, and that ends justify means. Public confidence is directly affected by the manner in which a judge or justice accords himself or herself in public, by the collegiality which he or she shares with other judicial officers, and by the quality of his or her legal reasoning.

It is an unfortunate truth that judicial officers in West Virginia must stand for office in political elections.[3] Notwithstanding this political selection method, the public's confidence in our system of justice is necessarily undermined and the stability and predictability of the rule of law is compromised when politics cross the threshold of our Court. The most important factors therefore affecting the public's perception of actual justice in this Court necessarily are the actual decisions of this Court, and its members, over time, the professional demeanor of this Court's members, and the quality of the written opinions and orders which we produce in specific cases.[4]

By baiting emotions, I believe the Dissenting opinion adopts a distinctly "political voice" rather than a "judicial voice." With due respect to my dissenting colleagues, this case does not present a close call on the basis of the rule of law. Because the Majority decision possesses such a deep strength of legal authority, I do not believe that the Dissenting opinion in any way weakens the authority or substance of the Court's decision.

The law governing the Court's decision of this case is clear. Accordingly, the focus of this concur-

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[3] The West Virginia Constitution requires that judicial officers in West Virginia be elected by the People. *See* W. Va. Const. art. VIII, §§ 2, 5, 10 and 16. The West Virginia Legislature has, by statutory law, required such elections to be partisan. W. Va. Code § 3-5-4.

[4] *See* Charles S. Trump IV, *The Case in Favor of the Nonpartisan Election of Justices of the Supreme Court of Appeals of West Virginia*, The West Virginia Lawyer, 24 (May 2000) ("Upon the bench we hope to see jurists who will decide cases upon a dispassionate reading of the law and the reasoned application of the law to the facts before them.").

rence is limited to four specific topics: the proper view of the facts on appeal, the transactional approach to *res judicata*, the proper standard of review for a forum selection clause, and the issue of recusal.[5]

I.

REVIEWABLE FACTS LIMITED TO PRE-TRIAL RECORD

Turning first to the more substantive issues of the case, the Dissenting opinion launches into a lengthy, twenty-two page discussion of the evidence admitted during the trial of this matter and certain determinations made by the circuit court based upon that evidence. The dissent then uses this trial evidence and associated court rulings to justify its position on how the instant case should have been re-

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[5] As an aside, I pause briefly to note that the Dissenting opinion begins by quoting from the Majority opinion that was filed in this action on November 21, 2007, prior to the rehearing of this case. Notably, however, that opinion no longer has any force or effect. *See State ex rel. Moats v. Janco*, 154 W. Va. 887, 901, 180 S.E.2d 74, 83 (1971) ("As a general rule, when a rehearing is granted, the status of the case is the same as though no hearing had occurred. . . . The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal. . . . By reason of the rehearing heretofore granted[,] the Majority opinion[, the concurring,] and the dissenting opinions heretofore filed in this case are withdrawn and held for naught." (internal citations omitted)). *See also Miller v. Burley*, 155 W. Va. 681, 698, 187 S.E.2d 803, 813 (1972) (same); *Atlantic Greyhound Corp. v. Public Serv. Comm'n of W. Va.*, 132 W. Va. 650, 665, 54 S.E.2d 169, 177 (1949) ("The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal.").

solved. I do not believe this analysis by the dissent to be legally sound. Due to the posture of the instant appeal, *i.e.*, the dispositive matters actually before this Court on appeal, this Court's review is limited. As a court of appeals, this Court simply cannot consider issues not appealed by the parties or the evidence that was admitted during trial on such non-appealed issues. Specifically, there were two dispositive issues before this Court for review: (1) the circuit court's denial of the Massey defendants' *pre-trial* motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA, and (2) the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*.

With respect to the Massey Defendants' pre-trial motion to dismiss based upon the forum-selection clause, the Majority opinion correctly limits its review to the facts that were before the circuit court at the time of its ruling on the motion. Indeed, the Majority opinion correctly observes that "the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the complaint." Maj. op. at 32. *See also* Maj. op. at 49 n.30 ("The proper question . . . is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*." (emphasis added)).[6] *Cf. Powderidge Unit Owners Ass'n v. High-*

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[6] The Majority opinion further points out that

> only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in decid-

land Props., Ltd., 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. *To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.*" (emphasis added)).

With respect to the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*, the Majority opinion correctly observes that the circuit court properly denied the Massey Defendants' original motion for summary judgment as there was no final order in the Virginia action at the time that the original summary judgment motion was made to the circuit court. However, the Majority opinion goes on clearly to explain that the summary judgment issue could be raised for the first time on appeal, and appropriately addresses the issue in the same manner that the circuit court would have had the Virginia case been final at the time the Massey Defendants' original summary judgment motion was made before the circuit court. Therefore, the Dissenting opinion's reliance upon facts developed during the eventual trial of this matter to support its po-

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> ing whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment.

Maj. Slip op. at 32.

sition herein is simply wrong because those facts were not before the circuit court at the time the summary judgment motion was filed and ruled upon.

II.

TRANSACTIONAL APPROACH TO *RES JUDICATA*

In ascertaining the proper test to be applied to the element of *res judicata* requiring identity of the cause of action, the Majority properly applies the transactional test, which was in place in Virginia at the time the complaint in the action underlying this appeal was filed in the Circuit Court of Boone County: October 1998.[7] Indeed, in April 1996, rela-

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[7] Nevertheless, I note that Virginia has a long history of applying the transactional approach, beginning as early as 1884. *See Wohlford v. Compton*, 79 Va. 333, ___, 1884 WL 5056, *4 (Va. 1884) ("When a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world. This principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit."). *See also Blackwell's Adm'r v. Bragg*, 78 Va. 529, ___, 1884 WL 5003, *5 (Va. 1884) ("'The doctrine of res judicata applies to all matters which existed at the time of giving the judgment, or rendering the decree, *and which the party had the opportunity of bringing before the court*. . . . There is no relief prayed for in this which the appellants could not have obtained in that suit, if entitled thereto. There are no material averments in the bill in this case which could not have been investigated and passed on in that, and which in effect were not passed on by the final decree in that case.'" (citations omitted) (emphasis added)); *McCullough v. Dashiell*, 6 S. E. 610, 612 (Va. 1888) ("[A]lthough this court may be of opinion that it is only necessary to notice certain questions as they are decisive of

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the case, yet all questions involved in the appeal are finally adjudicated, whether distinctly raised and passed on below and here or not. If they are involved, and might have been passed on, it is enough. . . . *The doctrine of res judicata applies to all matters which existed at the time of giving the judgment or rendering the decree, and which the party had the opportunity of bringing before the court.*" (emphasis added) (citations omitted)); *Fishburne v. Furguson*, 7 S.E. 361, 362-63 (Va. 1888) ("It is necessary, first, to consider whether this suit is concluded by the suit referred to in Franklin county; for, if the question is res adjudicata, the whole matter ends there; for, when a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world. *This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case*; and when the facts which constitute the cause of action or defense have been between the same parties submitted to the consideration of the court, and passed upon by the court, they cannot again be the proper subjects for an action or defense, unless the finding and judgment of the court are opened up or set aside by competent authority. This principle of law extends still further in quieting litigation. A party cannot relitigate matters which he might have interposed, but failed to do in a prior action between the same parties, or their privies, in reference to the same subject-matter." (emphasis added) (citations omitted)); *Beale's Adm'r v. Gordon*, 21 S.E. 667, 669 (Va. 1895) ("When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy. . . . The decree in the first cause is not only final as to the matters actually determined, but *as to every matter which the parties might have litigated, within the scope of the pleadings in the cause, and which might have been decided*." (emphasis added) (citations omitted)); *Brunner v. Cook*, 114 S.E. 650, 651 (Va. 1922) ("'When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive on the latter

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not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.'" (quoting 15 R. C. L. "Judgments," § 438, p. 962)); *Gimbert v. Norfolk S.R. Co.*, 148 S.E. 680, 689-90 (Va. 1929) (same); *Choate v. Calhoun*, 149 S.E. 470, 471 (Va. 1929) (same); *Kemp v. Miller*, 186 S.E. 99, 103 (Va. 1936) (same); *Jones v. Morris Plan Bank of Portsmouth*, 191 S.E. 608, 610 (Va. 1937) ("The well established rule forbidding the splitting of causes of action is clearly stated in 1 Am. Jur., 'Actions,' § 96. It is there said: 'One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible, subject, however, to the power of the court to order consolidation. On the other hand, one who has a claim against another may take a part in the satisfaction of the whole, or maintain an action for a part only, of the claim, although there is some authority to the effect that a part of a demand cannot be waived for the purpose of giving an inferior court jurisdiction. But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice, namely, that litigation should have an end and that no person should be unneces-

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sarily harassed with a multiplicity of suits.'"); *Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising from the same transaction is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (quoting American and English Encyclopedia of Law, Second Edition, volume 24, page 779)); *Royall v. Peters*, 21 S.E.2d 782, 787 (Va. 1942) ("There must at some time be an end to controversies. Courts are for the purpose of furnishing a speedy end to litigation and not as a forum for endless contentions. Carelessness or after-thought on the part of litigants ought not to be allowed to affect the conclusiveness of a proceeding which has been determined after ample opportunity for a hearing of every question which might have been litigated."); *Griffin v. Griffin*, 32 S.E.2d 700, 703 (Va. 1945) ("The appellant not only had the opportunity of bringing this ground for divorce between the court in the first suit but she had the opportunity, and *it was her duty to bring before the court in the first suit any other ground for divorce that existed at that time.* There was a final decree in the first cause rendered by a court of competent jurisdiction on the merits. It necessarily bars the appellant from conducting a subsequent suit involving the same cause of action."); *Shepherd v. Richmond Eng'g Co.*, 36 S.E.2d 531, 534-35 (Va. 1946) ("The law does not permit the owner of a single or entire cause of action or entire indivisible demand, without the consent of the person against whom the cause or demand exists, to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. . . . That appellee must stand or fall by its election of remedies is fundamental."); *Eason v. Eason*, 131 S.E.2d 280, 282 (Va. 1963) ("When the second suit is between the same parties as the first, and on the

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same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . . ." (quotations and citation omitted)); *Hagen v. Hagen*, 139 S.E.2d 821, 823 (Va. 1965) (same); *Bates v. Devers*, 202 S.E.2d 917, 920-21 & n.8 (Va. 1974) ("A valid, personal judgment on the merits in favor of defendant bars relitigation of the same cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (citing Restatement of Judgments §§ 47, 62 & 83 (1942)); and "A 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a definable factual transaction*." (emphasis added)); *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903, 905 (Va. 1986) ("When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . . ." (quotations and citation omitted)); *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495 (Va. 1988) ("A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire

tively close in time to the period pertinent to this action, the Supreme Court of Virginia applied the transactional approach to the issue of *res judicata* in the case of *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B and C*, 468 S.E.2d 894, 904 (Va. 1996), wherein the Supreme Court of Virginia observed that "even though the first demand described only specific defects, the doctrine of res judicata applies to *all claims which could have been brought*, thereby preventing a party from splitting his cause of action." (Emphasis added). Furthermore, Virginia courts have recognized that, both traditionally and during the period of time relevant to this case, Virginia has applied the transactional approach.

> The Virginia Supreme Court applies the . . . transactional analysis in considering the scope of a transaction for the application of res judicata . . . . In *Trout v. Commonwealth*

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or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case." (quotations and citations omitted)); *Waterfront Marine Constr., Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B & C*, 468 S.E.2d 894, 904 (Va. 1996) ("[E]ven though the first demand described only specific defects, the doctrine of res judicata applies to all claims which could have been brought, thereby preventing a party from splitting his cause of action.").

Transp. Commissioner, 241 Va. 69, 73, 400 S.E.2d 172 (1991), the Supreme Court discussed this broad transactional concept:

> An "action" and a "cause of action" are quite different. "Action" is defined by Code § 8.01-2, as noted above.[8] We defined "cause of action" in *Roller v. Basic Construction Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989), as "a set of operative facts which under the substantive law, may give rise to a right of action."

> Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, § 24 for purposes of defining "cause of action." One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.

Lake Holiday Country Club, Inc. v. Teets, Nos. 00-44, 00-46, 00-47, & 00-70, 2001 WL 34037926, at *7 (Va. Cir. Ct. 2001). *See also Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996) ("As

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[8] Pursuant to Va. Code Ann. § 8.01-2, "'Action' and 'suit' may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts."

can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, §24 for purposes of defining 'cause of action.'"); *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504, 515 (Va. 2003) (Kinser, J., dissenting) (observing, in case which post-dated the present action, that majority opinion overruled transactional approach that previously applied, commenting "[i]n truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside.").

The dissent argues that the transactional approach was not so clearly established in Virginia; however, the dissent points to no case that would apply to the instant action and require application of a rule other than the transactional approach. Furthermore, the dissent contains notable error. For example, the dissent represents that the case of *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1988), applied the best evidence test. To the contrary, *Saunders* actually set out the transactional approach as the appropriate test:

> A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole

> cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case.

Saunders, 367 S.E.2d at 495 (quotations and citations omitted).

The dissent also incorrectly implies that *Bates v. Devers*, 202 S.E.2d 917 (Va. 1974), utilized the same evidence test. Bates, in fact, applied the transactional approach as demonstrated by that Court's finding that "[a] valid, personal judgment on the merits in favor of defendant bars relitigation of the Same [sic] cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (Citing Restatement of Judgments §§ 47, 62, 83 (1942)). 202 S.E.2d at 920-21. In a footnote, the *Bates* Court went on to state that "[a] 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a definable factual transaction*." 202 S.E.2d at 921 n.8 (emphasis added).[9]

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[9] The dissent is also erroneous in its assertion that "[i]t was in the 1974 case of *Bates v. Devers* . . . that the Virginia Supreme Court first referred in a footnote to the term 'transaction' in relation to the res judicata element of cause of action." Dis-

As the Majority opinion correctly notes, the Boone County action is barred by *res judicata* under the transactional approach that is applied pursuant to Virginia law, because the claims asserted in the instant action arise from the same operative set of facts involved in the earlier Virginia action.

III.

DE NOVO REVIEW OF FORUM-SELECTION CLAUSES[10]

The Dissenting opinion also finds fault with the *de novo* standard of review set out by the Majority opinion. Again, the Dissenting opinion is incorrect. To the extent that a determination of the applicability of a forum-selection clause may require this Court to review factual determinations made by a circuit court, our review of those specific determinations is under the "clearly erroneous standard." Syl. pt. 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W.

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sent. op. (Albright, J.) at 50. Instead, the Virginia Supreme Court utilized the term "transaction" in this manner as early as 1941. *See Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising from *the same transaction* is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (emphasis added) (quoting, American and English Encyclopedia of Law, Second Edition, volume 24, page 779)).

[10] In addition to criticizing the standard of review applied to forum-selection clauses, the Dissenting opinion takes issue with various other aspects of the forum-selection clause analysis of the Majority opinion. Though I choose to clarify this particular point, the Dissenting opinion's analyses of other issues appear to be more result-driven than legally meritorious, and will therefore not be discussed herein.

Va. 108, 492 S.E.2d 167 (1997) ("[W]e review the circuit court's underlying factual findings under a clearly erroneous standard."). Nevertheless, this Court often applies multi-faceted standards of review. Thus, while certain elements of an analysis, should they exist, might require deferential scrutiny, our overarching review of the general "applicability and enforceability" of a forum-selection clause is *de novo*. Syl. pt. 2, Maj. op.; *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*. In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff. Contract interpretation as a question of law is also reviewed *de novo* on appeal." (internal citations omitted)); *Cowatch v. Sym-Tech Inc.*, No. 07-2582, 2007 WL 3257238, at *1 (3d Cir. 2007) ("Our review of the District Court's construction of the forum selection clause is plenary." (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216 (3d Cir. 1991))); *Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir. 2007) ("The district court's order granting Adagen's Rule 12(b) (3) motion for improper venue based on the contractual forum-selection clause is subject to de novo review." (citation omitted)); *Calix-Chacon v. Global Intl Marine, Inc.*, 493 F.3d 507, 510 (5th Cir. 2007) ("[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law de novo." (quoting *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002))); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) ("We also note that 'the en-

forceability of a forum selection clause is a question of law that we review de novo.'" (quoting *Baker v. LeBoeuf Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir. 1997))); *American Soda, LLP v. US. Filter Wastewater Group, Inc.*, 428 F.3d 921, 925 (10th Cir. 2005) ("We review the enforceability of a forum selection clause de novo." (citing *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir. 2002))); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (1st Cir. 2001) ("We review a district court's dismissal based on a forum-selection clause de novo."); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997) ("In the case at hand, neither party challenges the validity of the forum selection clause; rather, they contest the specific meaning of the language used in the forum selection clause. . . . [W]e conclude that de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause. . ."). In the instant case, the forum-selection clause was reviewed in the context of a motion to dismiss. In this context, there simply were no factual determinations made by the circuit court that required deferential review. Thus, the Majority's *de novo* review of the circuit court's forum-selection clause ruling is proper.

IV.

DISQUALIFICATION AND DUE PROCESS

In footnote 16 of the Dissenting opinion, reference is made to the motions filed by the Appellees seeking my disqualification from this case – espe-

cially the last such motion filed by Appellees.[11] Specifically, the Dissenting opinion contends that "both actual *and apparent* conflicts can have due process implications on the outcome of cases affected by *such* conflicts" and "[i]t is now clear, especially from the last motion for disqualification . . . that there are now [such] due process implications" in this case. Dissenting Slip Op., at 55 (emphasis added). The Dissenting opinion provides no legal analysis for this contention. Nor does the Dissenting opinion, or the Appellees herein, claim any actual bias or prejudice on my part in this case.[12] Indeed, neither the Dis-

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[11] This last motion seeking my disqualification was filed March 28, 2008, three-and-a-half years after my 2004 election, over seventeen months after the filing of this appeal on October 24, 2006, over four months after the initial decision of this Court on November 21, 2007 (in which I voted with the majority against the interests of the Appellees), and over two weeks after oral arguments were heard on the reconsideration of this appeal. The primary basis of this last disqualification motion was a survey taken by the Appellees which can best be described as a "push-poll"; *i.e.*, a survey wherein limited and selective background information is conveyed to individuals, the purpose or result of which is to "push" the individual being surveyed to a negative inference or response against a public individual. "Push-polls" are unlawful in West Virginia when used in elections. W. Va. Code § 3-8-9(a) (10) (1999). The motion was denied as being untimely and because "push-poll"-type surveys of this kind, are, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.

[12] The Dissenting opinion uses the phrase "both actual and apparent conflicts" in describing the type of conflict to which the Dissenting opinion believes that due process implications may attach. The Dissenting opinion, however, omits any legal analysis to define what it contends is meant by the term "apparent." If "apparent" means "obvious," the phrase would sim-

senting opinion nor the Appellees herein point to any actual conduct or activity on my part which could be termed "improper."[13] Rather both the Dissenting

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ply mean those conflicts which are *both* actual *and* obvious. Such a meaning comports with a legitimate concern for "actual" conflicts (such as *actual* biases and prejudices which directly implicate due process) which are also plainly evident to the judicial officer and the public (implicating a duty to recuse and a concern for public confidence). Conversely, though, the Dissenting opinion may instead intend the term "apparent" to be a wholly separate form of conflict, distinct from an *actual* conflict. In that sense, the Dissenting opinion's footnote would refer to either of two separate and distinct types of conflicts which may implicate due process considerations: actual conflicts and appearance-driven conflicts (conflicts subjectively-defined according to criteria which may vary from observer to observer). The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process.

Although the Dissenting opinion provides no legal analysis to define the phrase, it would seem that the dissenters advance an inconsistent subjective standard. Because both the Dissenting opinion and the Appellees in essence concede that there is no objective "actual" conflict or improper actions or conduct herein with respect to me, the Dissenting opinion proposes that a conflict sufficient to implicate due process considerations for which disqualification is necessary may be *either* an "actual objective conflict" (which is not applicable herein) or a "conflict created by or defined by subjective appearances" (which they perceive is present herein).

[13] Canon 2A, of the W. Va. Code of Judicial Conduct, prohibits judges from engaging in activities which are improper or which give the appearance of impropriety. Often, this term is taken out of context by omitting reference to the term "activities." That some form of action by a judge is necessary in context with the term "appearance of impropriety," is evident from the

opinion and the Appellees focus on appearances – some generated by the media, some generated by a recused member of this Court with a history of verbal discourtesies toward Appellant Massey, and some generated herein by the Appellees, themselves.

By its inclusion of Footnote 16, one must conclude that the Dissenting opinion advocates that the concept of "appearance-driven" judging should bring about a different substantive outcome in this matter. That is disappointing. Justice should not be deter-

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Commentary to Canon 2A which focuses on "irresponsible or improper *conduct* by judges." (Emphasis added.) Furthermore, Canon 2A specifically applies to activities or conduct of the judge, himself or herself, not activities or conduct of third-parties or litigants which are outside the judge's control. While challenges to a judge because of the independent activities of a third-party may be an acceptable practice in a system focused on "political or appearance-based justice," it finds no basis in Canon 2A. Unless the dissenters or Appellees herein contend that the act of lawfully running for elective office or the required duty of judging a case is an activity within the purview of Canon 2A, the dissenters and Appellees must necessarily contend that appearances caused by the past activities of third-parties over which a judge or a judicial candidate exercises no control, from which he or she seeks no benefit, and for which he or she will obtain no current or future benefit may nevertheless serve as a basis for disqualification. *See* Footnote 15, *infra* (West Virginia is a "duty to judge" judicial system). *See also State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995) (running for office is a fundamental right). Such a scenario, particularly where the supposed conflict occurred in the past with no potential for current or future benefit to the judge based upon his or her decision, would serve to open the judicial system to easy manipulation by external forces and would lead to a destruction of public confidence in our judiciary.

mined more by the popularity, or lack thereof, of a given litigant or a given result than by the rule of law. Rather, justice must always emphasize the importance and definiteness of the law in the resolution of disputes. In that manner, my participation herein was wholly consistent with due process.[14] Because of the reference to the disqualification issue in Justice Albright's Dissenting opinion, I feel obligated to comment on this matter of "apparent conflict."

A. The Measure of Fairness: Actual Justice

The fundamental question raised by the Appellees and the Dissenting opinion herein is whether, in a free society, we should value "apparent or political justice" more than "actual justice." The latter is dependent on the quality of the law applied by a court

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[14] In a judiciary founded on the rule of law rather than political artifice, it is an extraordinary and unprecedented argument which contends that "*apparent* conflicts" alone can have such an effect on the outcome of a case that due process considerations are implicated. While appearances should be considered in a discussion of public confidence in the judiciary, appearances alone, subject as they are to manipulation by partisan elements (including litigants), should never alone serve as the basis for a due process challenge to an otherwise well-founded legal opinion of a court of law. Public confidence is enhanced by a system founded on actualities and the rule of law. Appearance-based criteria for judicial disqualification emphasizes the importance of "public confidence" in the judiciary as its most important value, not judicial independence, the accuracy of justice, or stability and predictability in our judicial system. Public confidence is a legitimate concern for our judicial system – but not in a vacuum. Concerns within the judicial system must be balanced. In the long run, I believe that judicial independence, the accuracy of justice and the stability and predictability of our judicial system are far more important to the public's long-term confidence in our judicial system.

and is measured by the critical analyses of a court's written decisions. Actual justice is based on actualities. Through its written decisions, a court gives that transparency of decision-making needed from governmental entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end-result as measured by dominant partisan groups such as politicians and the media, or by the litigants, themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias. Since all cases will generally have a winner and a loser, a system based upon "apparent or political justice" will be the subject of constant criticism – all partisan, little academic.

To assuage attacks on itself, a court immersed in "apparent or political justice" will find it necessary to curry favor with those groups or individuals with the loudest or shrillest voices, as well as those groups or individuals with the most radical means of gaining public attention. In doing so, decisions not only will be biased toward certain groups and their favored positions, but decision-making will necessarily take on an inductiveness, where the desired end-result for a case determines the manner in which the court conducts its legal analysis. Since justice then would be determined by the ebb and flow of political opinion, justice will become more actively policy-driven, and our judges, like terriers jumping for treats, will promote a judicial system decidedly unstable and unpredictable.

In direct opposition to the drive to appearance-based judging is Canon 3B(2), of the Code of Judicial Conduct, which requires that "[a] judge shall be faithful to the law and . . . not be swayed by partisan

interests, public clamor, or fear of criticism." This ethical admonition succinctly dispels any contention that appearance-based judging should supercede judging based on actualities. Simply stated, a decision which is firmly rooted in legal substance should not yield to a collateral partisan attack which manipulates appearances. Rather, it should rise or fall on its own substantive merits.

Proper legal decisions should never be mere rationalizations fronting for political correctness. Nor should actual justice be fettered by the political expediencies of the day. Partisan rhetoric and resorts to emotion-laden rants betray a contempt for the judiciary's role in a constitutional government. Sadly, such political considerations have, it seems from recent behaviors, institutionalized and entrenched themselves in our Court. This politicization of our judiciary must be ended. Our judicial system should be resolutely founded on the rule of law, administered by conscientious and dispassionate judges, and legitimized through well-reasoned legal opinions. We must do *actual* justice to achieve *actual* justice. Public confidence requires no less.

B. Recusal and Due Process

West Virginia' s judicial officers have a duty to hear such matters as are assigned to them except those in which disqualification is required. Canon 3B(1).[15] This "duty to sit" is not optional. As Judge John Sirica eloquently stated:

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[15] Canons 3A and 3B(1) of the W. Va. Code of Judicial Conduct require that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required" and that the "judicial duties of a judge take precedence over all the judge's other activities." Canon 3E(1) provides that "[a]

> [T]he Court cannot overlook the fact that it has an obligation to deny insufficient recusal motions. There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. . . . After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preferences or individual views as it does the law. I have no choice in this case . . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

U.S. v Mitchell, 377 F.Supp. 1312, 1325-26, (D.C. Cir. 1974) (internal citations omitted), *aff'd sub nom. Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) (en

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judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned. . ." (Emphasis added.) The use of the qualifier, "reasonably," presupposes a knowledge of all facts material to an impartiality determination. It implies a thoughtful, impartial and well-informed observer. Furthermore, this qualifier helps to ensure that illegitimate attempts to remove an elected judge are unsuccessful. *See* Footnotes 11, *supra*, and 48, *infra* (use of push-poll-type survey conveying limited information legally insufficient as basis for disqualification of publicly-elected judge). Although some specific examples are given of situations in which a judge should recuse himself or herself, the standard itself is indefinite in recognition of the balancing of interests which must occur when a judge considers recusal. Extreme cases are clear under any standard. The key consideration appears to be that a judicial officer should not judge a case where his or her own personal interests could be preferred over the rule of law. The rule is certainly not an invitation for litigants to attempt to manipulate the system for strategic reasons, nor is it a means by which judges may avoid difficult cases.

banc), *cert denied*, 418 U.S. 955, 94 S.Ct. 3232, 41 L.Ed.2d 1177 (1974).

Matters related to a state's method for selection and disqualification of its judicial officers belong appropriately to the individual states. "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948). *See Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 411, 71 L.Ed. 749 (1927) ("[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."); *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."). *See also Wheeling v. Black*, 25 W. Va. 266, 270 (1884) (disqualification of judicial officer from duty to judge because of an actual interest in a cause of action deemed to be a matter of legislative discretion). The focus is on what actually affects a judge's decision-making.

The Due Process Clause simply does not establish a "uniform standard," such as the Appellees and the Dissenting opinion seek to portray herein. It establishes a "constitutional floor." *Bracy*, 520 U.S. at 904-05, 117 S.Ct. at 1797. This due process "floor" is "a 'fair trial in a fair tribunal,' before a judge with no *actual* bias against the defendant *or interest in the outcome of* his particular case." Id., at 904-05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct.

1456, 1464, 43 L.Ed.2d 712 (1975) (citations omitted) (emphasis added).[16]

It has long been recognized that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. Due process therefore requires recusal only in those rare cases wherein a judge or justice has a "direct, personal, substantial [or] pecuniary interest" in the outcome of the case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S.Ct. 1580, 1585, 89 L. Ed. 2d 823 (1986) (quoting *Tumey*, 273 U.S. at 523, 47 S.Ct. at 441).

The Dissenting opinion's conjoining of real and apparent conflicts mistakenly suggests an equality between actual conflicts and appearance-driven conflicts unsupported by the law with respect to claims of constitutional violations. A proper ordering of claimed conflicts is necessary to define a due process framework that separates legitimate claims of actual constitutional impairment from illegitimate claims;

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16 "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 494 (1972). It is "not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Thus, its "very nature . . . negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* Here, the Appellees and the Dissenting opinion would render all relevant facts and policies related to an individual judge's recusal consideration and a state's balancing of interests in election laws and judicial ethics immaterial in favor of a static rule of disqualification determined by appearances which are themselves subject to ready manipulation by litigants and third persons with an interest in the outcome of a given case.

especially where illegitimate claims serve to divert attention from the legal certainty of a court's decision and the inability substantively to challenge that decision. Under the self-serving due process standard of disqualification proposed by the Appellees and the Dissenting opinion herein, the actual purpose of due process would be frustrated by litigants who would hold a near-veto power over the composition of a publicly-elected court, by those who could wage public relations campaigns designed to malign judicial officers in order to manufacture "apparent conflicts," and by those who would challenge a decision not by its legal correctness, but by its political correctness. The long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable.

The Dissenting opinion's passing reference, without analysis, to *Aetna* and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), fails to support its contention that there are due process implications herein based simply on subjective perceptions of "appearances." *See Aetna*, 475 U.S. at 822-24, 106 S.Ct. 1585-87 (due process required disqualification of state supreme court justice because he had a "direct, personal, substantial, [and] pecuniary interest" in deciding a case in such a manner as to "enhanc[e] both the legal status and the settlement value of" the judge's own similar pending lawsuits); *In re Murchison*, 349 U.S. at 133-39, 75 S.Ct. at 624-27 (due process required disqualification of judge who served as a "one-man grand jury" and then presided over the criminal trial of the man whom he had prosecuted). *See also, Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954) (due process implicated where a judge who harbored actual bias

against an attorney nevertheless sat in judgment of the attorney in a contempt proceeding); *Tumey*, 273 U.S. at 523, 535, 47 S.Ct. at 441, 445 (due process violated where mayor who presided over mayor's court had a direct financial interest in convicting defendants and in imposing fines). Indeed, the phrase used by the Dissenting opinion, "both actual and apparent conflicts," appears nowhere in either *Aetna* or *In re Murchison*.

Neither Appellees nor the Dissenting opinion have presented any evidence consistent with the *Aetna* standard for implication ofthe Due Process Clause of the Fourteenth Amendment. Rather, they rely on subjective, after-the-fact speculations and assumptions. "The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392, 158 L.Ed. 225 (2004) (Scalia, J.) (Memorandum on Motion for Disqualification) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000) (Rehnquist, C.J.) (Memorandum regarding recusal). Reliance on cases such as *Aetna* and *In re Murchison* for the contention that disqualifications of a publicly elected judicial officer may be based solely upon after-the-fact appearance-based or politically-driven conflicts is consequently misplaced. Unlike the judges in *Aetna* and *Tumey*, I have no pecuniary interest in the outcome of this matter. Unlike the prosecutor/judge in *In re Murchison*, or the judge/mayor in *Tumey*, I have no conflicting dual role in this matter. Unlike the judge in *Offutt*, I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.

Nor do the due process contentions of the Appellees and the Dissenting opinion find support in other venues. Although federal judges arguably no longer have a "duty to sit,"[17] the federal recusal statute at 28 U.S.C. § 455(a) (1990) does reference "appearances of impropriety." *See* Footnote 13, *supra*. Federal courts have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications. As recently recognized by the Third Circuit, no decision "has held or clearly established that an appearance of bias on the part of a judge, without more, violates the Due Process Clause." *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 544 U.S. 924, 125 S.Ct. 1639 (2005); *accord Callahan v. Campbell*, 427 F.3d 897, 928-29 (11th Cir. 2005); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371-82 (7th Cir. 1994) (*en banc*). In *Johnson*, the Third Circuit concluded that, absent some other disqualifying conflict, appearances alone do not implicate due process considerations. In *Del Vecchio*, the Seventh Circuit similarly held that "bad appearances alone do not require disqualification" pursuant to the due process clause because "only a strong, direct interest in the outcome of a case is sufficient to overcome [the] presumption of [the judge's] evenhandedness." *Del Vecchio*, 31 F.3d at 1372-74. "[T]he United States Supreme Court has never rested due process on appearance."

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[17] Although it has been asserted that changes in 1974 to the federal recusal statute, 28 U.S.C. § 455 (1990), were designed to eliminate a judge's "duty to sit" (*See Baker v. City of Detroit*, 458 F.Supp. 374 (E.D. Mich. 1978), federal judges continue to have a duty not to disqualify themselves without a reasonable basis. *See, e.g., Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983).

Id. at 1372 n. 2. As pointed out in a concurrence in *Del Vecchio*, disqualification based upon appearance-based conflicts "is a subject for statutes, codes of ethics, and common law, rather than a constitutional command." *Id.* at 1391 (J. Easterbrook, concurring).[18]

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[18] The "apparent conflict" standard advanced by the Appellees and the Dissenting opinion would also lead to the rather bizarre situation in which a judge with an actual bias or interest in the outcome of a case would nevertheless sit in the case, while a judge with absolutely no bias, prejudice or interest in the outcome of a case could be forced off of the case by the manipulation of appearances outside of the judge's control. For example, if a judge develops an actual animosity toward a litigant or to counsel during a case, recusal is not required. *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 1155, 127 L.Ed. 2d 474 (1994). Therefore, under the standard set forth by the Dissenting opinion, a judge without any bias whatsoever could be disqualified so long as it could be claimed that there was an "apparent conflict", but a judge who had an actual bias could remain on a case so long as that bias developed during the pendency of the case. The same scenario is presented by the Rule of Necessity, in which justices with actual interests in the outcome of a case may nevertheless be required to hear the case. *See* (Syl. pt. 7), *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994) ("The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.") Such inconsistencies highlight the fundamental flaws of the "apparent conflict" standard posed by the Dissenting opinion.

Furthermore, the only limitation to recusal motions based upon an appearance standard would be the imagination of a party. Would judges who are former legislators be subject to disqualification motions when reviewing legislation passed while they were members of the legislature? Would judges who are church members be subject to disqualification in cases involving issues such as abortion or "church and state"? Would

C. West Virginia Has Chosen to Select Judges in Partisan Elections

Historically, West Virginia has exercised its prerogative to regulate its judiciary and to elect judges and justices in partisan judicial elections through the enactment of constitutional and legislative standards, as well as by the Supreme Court of Appeals' adoption of ethical rules, that weigh and accommodate the competing interests at stake.[19] Incumbent

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former prosecutors be subject to disqualification in criminal cases because they were "law and order" prosecutors?

[19] *See* Footnote 3, *supra*. *See also Matter of Starcher*, 193 W. Va. 470, 475, 457 S.E.2d 147, 152 (1995) (reprimand of judge for violation of judicial ethics regarding improper *ex parte* communications with party during trial), wherein then-Chief Justice Neely, in dissent, stated, "In this State, judges get to be judges because they are political leaders . . ." *Matter of Starcher*, 193 W. Va. at 475, 457 S.E.2d at 152 (Neely, C.J., dissenting). While there may be disagreement within this State on the proper method for selection of its judicial officers, especially on whether elections should be partisan, it is, I believe, a decision for the people of this State to make. I must disagree, however, with those who believe that politics and partisanship, particularly during an election cycle, have any place in this Court or anywhere in West Virginia's judicial system. *See contra State ex rel. Rist v. Underwood*, *infra*, 206 W. Va. 258, 282, 524 S.E.2d 179, 203 (Starcher, C.J., concurring, at Appendix A, n. 8: "[J]udges make policy as a matter of choice as well as function, for most know that sweeping issues are involved and they act upon their personal values in resolving those issues.") *See also State ex rel. Carenbauer v. Hechler*, *infra*, 208 W. Va. 584, 609, 542 S.E.2d 405, 430 (Starcher, J., dissenting: "It is utterly absurd to suggest that judges just 'apply the law,' and do not make decisions that are influenced by their philosophies – or their 'prejudices' – the unfortunate term that the majority chooses to use."). In a system wherein judicial officers believe it

in any state system which selects its judicial officers through the electoral process, particularly through partisan elections, are potential problems. In spite of such potential problems, the citizens of West Virginia, like the citizens of many other states,[20] have decided that all state judicial offices must be subject to the electoral process. *See* W. Va. Const. art. VIII, § 2 (Supreme Court Justices must be elected by voters); W. Va. Const. art. VIII, § 5 (circuit court judges must be elected by voters); W. Va. Const. art. VIII, § 10 (magistrate court magistrates must be elected by voters); W. Va. Const. art. VIII, § 16 (family court judges must be elected by voters). Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office. This now includes those who contribute to or support so-called Independent Expenditure Groups who engage in political campaigns completely independent of candidates of office.

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appropriate to harbor political biases and prejudices and to bring those "personal values" to bear in the determination of cases, one might question whether public pronouncements by such judicial officers are politically-driven and are designed not to serve the rule of law but rather to affect the outcome of litigation or an election thereby elevating "apparent- or political-justice" over actual justice. The long-term negative impact on the public's perception of the judiciary caused by judicial officers who use their offices to serve political ends or who pander to partisan prejudices is deeply troubling. *See IV. A. "The Measure of Fairness: Actual Justice"* herein.

20 *See generally Adair v. State, Department of Education*, 709 N.W.2d 567 (Mich. 2006).

West Virginia has a compelling and permissible interest in regulating its elections, the political activities of its judicial officeholders and candidates, and the manner in which its judicial offices are filled. *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 599, 542 S.E.2d 405, 420 (2000). In fashioning its rules regarding judicial campaigns, West Virginia's legislature and this Court have balanced the necessary contributions and mechanisms for support which are involved in all public elections with the need to protect the system through rules of conduct to guard against improprieties in the election process. *See Carenbauer, supra.*

For example, Canon 5 of the West Virginia Code of Judicial Conduct establishes specific limitations on a judge's or judicial candidate's political activity. Included in these limitations is a specific limitation which prohibits a judge or judicial candidate from personally soliciting or accepting campaign contributions. Canon 5C(2), W. Va. Code of Judicial Conduct. A similar limitation is placed on judges and judicial candidates seeking publicly stated endorsements. *Id.* Judges and judicial candidates may instead use committees within their campaigns, independent from personal knowledge or involvement of the judge or judicial candidate, to solicit campaign contributions and endorsements.[21] *Id. See In re Tennant*, 205 W. Va. 92, 516 S.E.2d 496 (1999) (judicial candi-

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[21] A "Finance Committee" was used by all of the Supreme Court judicial candidates for the 2004 election. There were no allegations of any ethical issues related to the funding of any of such candidates' campaigns. Campaign finance reports from the 2004 Supreme Court election may be viewed at the website of the West Virginia Secretary of State. *See* http://www.wvsos.com.

date admonished for personally soliciting campaign contributions); *Matter of Starcher*, 202 W. Va. 55, 501 S.E.2d 772 (1998) (admonishment of judge seeking election to Supreme Court of Appeals for personally soliciting publicly stated support); *In re Hill*, 190 W. Va. 165, 437 S.E.2d 738 (1993) (political endorsement of another judicial candidate by judge running for reelection not prohibited under Canon 7A(1) (b) of former-Judicial Code of Ethics (conduct now proscribed by Canon 5A(1) (b) of the current-Code of Judicial Conduct, effective January 1, 1993)).

West Virginia has adopted other limitations on judicial elections. For example, in *Carenbauer*, this Court ruled that a sitting justice is ineligible to run for a different seat on the Supreme Court prior to the expiration of his or her term. *Carenbauer*, 208 W. Va. at 598-600, 542 S.E.2d at 419-21. In *Carenbauer*, former-Justice Warren McGraw, who had been elected in 1998 to complete the remaining half of his judicial office's term, sought to run again in 2000 for another seat on the Court with a full twelve-year term. In ruling former Justice McGraw ineligible to run for a separate seat on the same court on which he was already sitting, this Court concluded that the State had a compelling and permissible interest in regulating political activities in judicial offices. *Id. See also Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993) (public censure of judicial officer for violating Judicial Code of Ethics related to misleading campaign advertisements).

In *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 524 S.E.2d 179 (1999), this Court considered a challenge to the Governor's appointment of the then-current Speaker of the House of Delegates as a Justice on this Court pursuant to the Governor's appointment powers for vacancies on this Court. *See*

W. Va. Const. art. VIII, § 7. This Court ruled that, under the Emoluments Clause of the West Virginia Constitution, the appointment was prohibited where, during the Speaker's current term of office, the Legislature had enacted a pay increase with respect to such judicial office. W. Va. Const. art. VI § 15.

West Virginia has enacted other rules applicable to judicial races.[22] For example, committees for candidates for the office of Justice of the Supreme Court of Appeals must file periodic verified financial statements detailing campaign contributions and expenditures with the Secretary of State. W. Va. Code § 3-8-5 (2007). West Virginia limits the contribution which an individual may give to a campaign to $1000 per election cycle. W. Va. Code § 3-8-12(f) (2005). Campaign contributors who contribute $250 or more must be identified by more detailed information, including address and business affiliation. W. Va. Code § 3-8-5a(a) (3) (2007). West Virginia, thus, achieves a measure of transparency in campaign funding in judicial races. Anonymous contributions are prohibited. W. Va. Code § 3-8-5a(I) (2007). Furthermore, corporations are prohibited from contributing to a candidate's campaign. W. Va. Code § 3-8-8(a) (2006). So-called Independent Expenditure Groups (or Section 527 Groups) are also subject to

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22 Candidates for the office of judge of the circuit court must have at least five years of active practice within the State. W. Va. Const. art. VIII, § 7; *State ex rel. Haught v. Donnahoe*, 174 W. Va. 27, 321 S.E.2d 677 (1984). Candidates for the office of justice of the Supreme Court of Appeals must have at least ten years of active practice within the State. *Id.*

regulation, including registration requirements. W. Va. Code § 3-8-12(g) (2005).[23]

D. The 2004 West Virginia Supreme Court of Appeals Election

The Appellees and the dissenters take the position that, notwithstanding a judge's duty to hear cases in West Virginia and the lack of any actual disqualifying basis, due process compels my disqualification because of "appearances" they contend exist from my election some four years ago. Specifically, the Appellees and the dissenters contend the following: (I) in 2004, a political Independent Expenditure Group (or "527" Group) called And for the Sake of the Kids ("ASK") independently campaigned against former-Justice McGraw, in part with contributions made to it by Mr. Blankenship; (ii) I won election; and (iii) this case involves Mr. Blankenship's employer, Appellant Massey. While this self-serving and oversimplified account of the 2004 election may advance an "apparent conflict" standard, its omission of material facts of what actually occurred in 2004 is disturbing.

The Appellees fail to consider the following: (I) the decision herein was issued over three years after my election[24]; (ii) in West Virginia, elected judges

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[23] *See* Rist, 206 W. Va. at 285, 524 S.E.2d at 206 (J. Starcher, concurring: "West Virginians are ahead of the curve in judicial campaign finance regulation. . . . [C]ampaign finance committees insulate judicial candidates from fundraising.")

[24] Massey sought appeal of this case on October 24, 2006, nearly two years after my election. On March 15, 2007, this Court deferred consideration of Massey's petition seeking appeal. The said appeal was unanimously granted by the Court on April 5, 2007.

have a duty to hear cases unless disqualification is required[25]; (iii) I neither have, nor at any time have ever had, any direct, personal, substantial or pecuniary interest, real or otherwise, in the outcome of this case; (iv) my campaign was completely independent of any independent expenditure group or individual, such as ASK[26]; (v) the outcome of the 2004 election was due primarily to my campaign's message of fairness, stability and predictability in decision-making, the importance of the rule of law to courts, and the need for judges to exercise civility, integrity and personal professionalism[27]; (vi) the campaign of my opponent, former-Justice McGraw, was devastated by a speech which he gave at Racine, West Virginia, on Labor Day, and by the effective publication of this speech to the people of West Virginia by the Benja-

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25 W. Va. Code of Judicial Conduct, Canons 3A, 3B(1). This "duty to hear" is also referred to as a "duty to sit."

26 Appellees merely presume the positive effectiveness of ASK and omit consideration of ASK's campaign against Attorney General Darrell McGraw's race in 2004 – which apparently came from the same budget. They give no consideration to the negative reaction which ASK may have had on many voters. Because they are independent, groups such as ASK and Consumers for Justice can both help and hurt candidates.

27 Additional significant material factors regarding the 2004 Supreme Court race were omitted from the Appellees' motions seeking my disqualification. For example, regarding the respective candidates' qualifications for office, *see* West Virginia State Bar Survey, http://www.wvbar.org/barinfo/announce/04JudQualPoll.htm. Furthermore, challenger Benjamin was endorsed over former-Justice McGraw by every major daily newspaper in West Virginia which did an endorsement in the race, except one newspaper. Former-Justice McGraw's refusal to debate was also a significant factor in his defeat.

min campaign[28]; (vii) no improper act or conduct, and no appearance of an improper act or conduct with respect to this case, or any other case, has occurred on my part; (viii) nothing in my history as a jurist (including a number of cases involving Massey and/or its subsidiaries) reveals any bias or prejudice for or against any of the parties in this case;[29] (ix) no attorneys, other than the counsel in this case,[30] have ever sought my recusal in a matter involving Massey – including the current administration and West

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28 In this speech, former-Justice McGraw made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere. *See* Footnotes 35 and 38, *infra*.

29 The Dissenting opinion would contend that due process considerations apply here, a case in which I voted for Massey's position, but strangely the Dissenting opinion makes no mention of its application in the other significant Massey cases wherein I voted against Massey's position. Indeed, the instant case may represent the only decision in which I have voted in favor of Appellant Massey's position and certainly does not represent the highest dollar value at issue for a case involving Massey. *See U.S. Steel Mining Co., LLC v Helton*, 219 W. Va. 1, 631 S.E.2d 559 (2005); *Helton v. Reed*, 219 W. Va. 557, 638 S.E.2d 160 (2006); *Massey Energy v Wheeling-Pittsburgh Steel Corp.*, No. 080182 (05/22/08). *See also Conflict*, Charleston Gazette, 02/26/08 ("Four times since 2005, [Justice Benjamin] has voted against Massey's interest in cases.")

30 Since I have been a Justice on this Court, the attorneys involved in this case are the only counsel who have sought my recusal in a Massey matter (noting that counsel for Appellee Harmon Mining is also counsel of record in *Wheeling-Pittsburgh Steel Corp.*, *see* Footnote 29 above, and, with local counsel, also moved for my disqualification therein on same grounds as set forth herein.)

Virginia's Attorney General[31]; and (x) former-Justice McGraw was, and had been for several decades, a colorful and controversial politician[32] in West Virginia and had an extremely contentious Democratic primary race in 2004 where significant electoral support went to his opponent, Circuit Judge Jim Rowe.[33]

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31 Although the same facts upon which the Appellees seek my disqualification in this case have been present at all times since my election, the State of West Virginia, by the Attorney General, Hon. Darrell McGraw, has never sought my disqualification. *See, e.g., Helton v. Reed, supra* or *U.S. Steel Min. Co., LLC v. Helton, supra.* Attorney General McGraw is a former member of this Court and is the brother of former-Justice Warren McGraw. Furthermore, the Department of Environmental Protection of the State of West Virginia has also declined to seek my disqualification in potential appellate environmental litigation involving Massey. According to a 11/03/2005 article by Ken Ward, Jr., in The Charleston Gazette, one year after my election, state regulators saw "no reason" to ask me to recuse myself. According to Perry McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking my disqualification. Mr. McDaniel stated, "There are clearly no grounds . . . for us to ask a Supreme Court justice elected by the people to step down in this matter." Such conclusions, as well as a jurist's actual record of decisions and behavior in office, are arguably material to a "perception" argument regarding recusal.

32 "[McGraw] is one of the most polarizing figures in West Virginia politics today." Hoppy Kercheval, *Hoppy's Commentary for Tuesday*, MetroNews, April 20, 2004.

33 This primary race was controversial. *See* Footnote 47, *infra*. "According to media reports published just after the May 11 primary election, [Independent Expenditure Group] Consumers for Justice was identified as having 'attacked' Greenbrier County Circuit Judge Jim Rowe, who was seeking to unseat incumbent . . . Justice Warren McGraw." Juliet Terry, *Political Groups' Donations Questioned – Consumer Attorneys*

The law simply does not support the Appellees' position. As such, the disqualification issue herein gives the appearance of being a diversion away from the solid basis for the majority's opinion herein.

Under the rules of this Court, the determination of whether a Justice should recuse him/herself from a case is left to the discretion of the individual Justice.[34] Of course, this discretion is tempered by the decision in *Aetna*, which held that "'it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion

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Group Gave More than $500,000 to state 527 Organization, The State Journal, 09/03/04. *See also* Footnote 41, *infra*. Former-Justice McGraw defeated Circuit Judge Jim Rowe in the Democrat primary by a margin of 147,030 (56.7%) to 112,199 (43.3%). *See* West Virginia Secretary of State, http://www.wvsos.com/elections/history/results/04%democrat_statewide%20offices.pdf. Immediately after the primary, Forest J. Bowman, professor *emeritus* of the West Virginia School of Law, stated, "Benjamin does have a shot against McGraw because he stands to capture much of the 'Rowe vote.'" Juliet Terry, *McGraw Looks to November; Benjamin Faces Uphill Battle*, The State Journal, 05/14/04. This sentiment was echoed by Steve Roberts, president of the West Virginia Chamber of Commerce, "The latest numbers indicate about 110, 000 Democrats said 'no thank you' to McGraw. That sends a very strong message that they are dissatisfied with the direction the McGraw court has taken." *Id.* According to one political commentator, if the general election were held immediately after the primary, "Benjamin could already expect to have about 40 percent of the vote." Chris Stirewalt, *Surprises are hard to come by*, Charleston Daily Mail, June 8, 2004.

[34] *See* Rule 29 of the West Virginia Rules of Appellate Procedure.

against him in his case.'" *Aetna*, 475 U.S. at 821-22, 106 S. Ct. at 1585 (quoting *Tumey*, 273 U.S. at 523, 47 S. Ct. at 441). Although I declined to recuse myself from this case, this Court did not invoke its authority under *Aetna* to remove me from the case. Simply put, I do not have, nor was there any evidence to show that I had a "direct, personal, substantial, pecuniary interest" in this case.

1. The Speech at Racine, West Virginia

During the 2004 general election, I ran as the Republican nominee for a seat on this Court. My incumbent opponent, former-Justice Warren McGraw, was the Democratic nominee. In the election, I received 382,036 votes (or 53.3%) and former-Justice McGraw received 334,301 votes (or 46.7%). *See*, West Virginia Secretary of State, http://www.wvsos.com/elections/history/results/allgeneral04.pdf.

Contrary to some who seek to minimize or dismiss it, the pivotal moment of the 2004 campaign was a Labor Day speech delivered by former-Justice McGraw at Racine, West Virginia. During that speech, Justice McGraw spoke in a screaming and unflattering manner.[35] Excerpts from the Racine

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[35] In this speech, former-Justice McGraw said, among other things: "My opponents want to portray the people of my party as if we are evil people. They want to tell you that the issue of abortion is one which is promoted by the Democrats. I say to you that's false! They want to tell you that members of my party have opposed school prayer. False! Not so! It's the Republican Party! The members of the Republican Party on the United States Supreme Court, and President of the United States, who gave you those issues when they control the Court and the people over in Washington. Not the Democrats. And just this year, not more than six months ago, the United States

speech were extensively aired as campaign advertisements by the Benjamin campaign throughout the State.[36] In the relevant text of the speech, Justice McGraw was screaming that people were following him "looking for ugly."[37] The McGraw speech at Racine soon became the subject of much conversation around West Virginia.[38] In the final analysis, for-

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Supreme Court approved gay marriage! Not Democrats! And you people ought to know that! And the Republicans ought to know that!" The entire Racine speech by former-Justice McGraw is available on the internet. *See* http://hillary.repeatable.com/watch-video/TQ6nQaE2FM8/WVCALA/warren-mcgraws-rant-in-racine.html

36 The Benjamin campaign's advertisement may be heard at http://easylink.ovsmedia.com/onlinevideoservice/aapc/2005/ovs51-RacineRant.wax.

37 An analysis of the 2004 campaign is available at Hon. Brent Benjamin, Speech at the Annenberg Public Policy Center Symposium: Judicial Advertising, National Press Club, 05/25/07 (pp. 41-51). *See* http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=219.

38 Shortly after political advertisements focusing on former-Justice McGraw's Racine speech was aired, the following observations of the speech were given by a statewide radio host and political commentator:

> . . . Last week, Supreme Court Justice Warren McGraw gave a campaign speech at the annual Labor Day picnic in Boone County that has given his opponents ammunition. Gant and Dean gave their opponents short sound bites; McGraw gave his opponents a whole speech. McGraw sounded as though he was coming unhinged as he ranted about his opponents following him around to take pictures of him to make him look ugly. He charged, erroneously, the "U.S. Supreme Court had approved gay marriage."

mer-Justice McGraw simply could not defend himself against his own words.[39]

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> A political consultant I talked with, known to be supportive of McGraw, told me the tirade by McGraw was "deeply disturbing." The consultant said the speech was "way over the top."
>
> In fact, it was. . . . McGraw's rants sound deranged, not passionate. His normally populist tone has been replaced by an angry tirade.
>
> . . . Yesterday when I talked about the speech on "Talkline" and played the GOP commercial, the phone lines were jammed with callers, mostly agreeing McGraw sounded on the verge of losing his mind.

Hoppy Kercheval, *Warren McGraw Unhinged*, MetroNews Talkline, September 15, 2004, http://www.freerepublic.com/focus/f-news/1263046/posts. *See also* Matt Bieniek, *Commentary: Paranoid Politics*, The Martinsburg Journal, September 27, 2004 ("[McGraw] said that the United States Supreme Court (which he pointed out is dominated by Republicans) had approved gay marriage. A complete falsehood coming from a man who obviously knew better [sic]. . . . But then when McGraw is given an opportunity to speak to the public and debate his opponent, he doesn't take advantage of it.")

[39] Prior to the speech at Racine, former-Justice McGraw declined an invitation to a debate sponsored by the League of Women Voters. Shortly after the speech, a spokesman for former-Justice McGraw defended the remarks at Racine: "[T]hey don't understand that that's just the southern way of campaigning. . . . Criticizing him for the way he talks is pure Yankeeism. He's not insane or losing his mind. That's just campaigning, southern-style." Juliet Terry, *Benjamin Camp Says McGraw Defeat Possible*, The State Journal, 09/24/04.

Former-Justice McGraw, himself, has acknowledged the impact which his speech at Racine had on his campaign. During the primary, Justice McGraw was involved in an automobile

2. Section 527 Independent Expenditure Groups

The primary thrust of the Appellees' argument is not that I should be disqualified because a party or attorney to the instant case directly contributed to my campaign. The Appellees' argument is that I should be disqualified because, without my knowledge, direction or control, an independent nonparty organization, ASK, received contributions from people or groups that included an employee of a party in this case, and ASK independently used its contributions to wage a campaign against my opponent four years ago.[40] If the Appellees' argument became the

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accident. Subsequent to his defeat, Justice McGraw filed a personal injury lawsuit against the other driver in which he claimed that this accident caused him to act as he did at Racine four months later:

> Due to the defendants' negligence in causing the automobile accident and severely injuring the plaintiff, plaintiff was portrayed in an extremely negative light due to the footage [from] the political rally filmed after the accident. Due in part to defendants' actions, Mr. McGraw lost the election, whereby [sic] losing his job and his yearly salary for the 12-year term.

Chris Dickerson, *Former Supreme Court Justice McGraw Suing Active Member of Navy*, West Virginia Record, September 6, 2006.

[40] The Appellees focus upon the amount of the contributions that Mr. Blankenship made to ASK. All such contributions and expenditures were completely independent of the Benjamin campaign, were lawful, were limited to the judicial election, and were apparently fully reported. Assuming, for the sake of argument, that the amount of a contribution given to a Section 527 political organization is to be the yardstick for *per se* disqualification, what amount should act as the minimum neces-

law, every judicial officer in this state would be disqualified from any and every case in which an independent nonparty organization over which the judicial officer had no control received contributions from individuals or groups which included a person or entity affiliated with a party or an attorney in the case, when the independent nonparty organization used its contributions to wage a campaign against the judicial officer's electoral opponent. Conversely, such a standard would likely require a judge also to recuse himself or herself when an independent expenditure group operated against the judge or supported the judge's opponent. Our judicial system would break down under such a standard for disqualification.

Two primary "Section 527" Independent Expenditure Groups operated during the 2004 Supreme Court election. The first, Consumers for Justice,

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sary for disqualification? Should that amount be $1 million dollars, $500 thousand dollars, $100 thousand dollars, $50 thousand dollars, $10 thousand dollars, or $1 thousand dollars? Further, should any purported minimum amount be the same for both Supreme Court Justices, who must run a state-wide campaign, and other state judicial officers, who only have to run in a few counties at most? Finally, if such a minimum amount is to be established, who should set this minimum amount, the judiciary or the legislature? In addition, should any such contribution require disqualification forever? Or for only a certain period? Or for only those cases actually pending before the Supreme Court of Appeals at the time of the contribution? Or for only those cases pending somewhere in the West Virginia judicial system at the time of the contribution? Or for those cases which *might* be contemplated to be filed somewhere in the West Virginia judicial system at the time of the contribution?

stridently opposed my candidacy.[41] Five weeks after Consumers for Justice filed its first campaign finance report, IRS documents indicate that ASK was founded on August 20, 2004, as a Section 527 independent political organization by Carl Hubbard and Dr. Daniel J. McGraw. See 26 U.S.C.A. § 527 (Supp. 2008). The United States Supreme Court has made the following observations regarding Section 527 political organizations:

> Section 527 political organizations are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any party, commit-

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41 The first Section 527 independent expenditure group formed during the 2004 Supreme Court race was a group which called itself, Consumers for Justice. Although it later turned out that Consumers for Justice was created as early as April 1, 2004, and began collecting and spending funds as early as April 13, 2004 (a few weeks before the end of the primary election), Consumers for Justice did not file its required paperwork notifying the IRS of its tax-exempt 527 status until June 30, 2004. Juliet Terry, *527 Groups to Play By New Rules*, The State Journal, 02/03/06. IRS rules require a 527 group to generally file its paperwork within 24 hours of being established. *Id.* According to a campaign finance report dated July 12, 2004, corporate contributions were the largest source of contributions to Consumers for Justice. Juliet Terry, *Political Groups' Donations Questioned – Consumer Attorneys Group Gave More Than $500, 000 to state 527 Organization*, The State Journal, *supra*. Five weeks after this filing, by Consumers for Justice, ASK established itself as a 527 group on August 20, 2004. Juliet Terry, *527 Groups to Play by New Rules*, The State Journal, *supra*. Consumers for Justice raised and spent approximately $2 million in the 2004 campaign against opponents of former-Justice McGraw. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22659'&criteriaName='West+Virginia+Consumers+for+Justice'.

> tee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.

McConnell v. Federal Election Comm'n, 540 U.S. 93, 174 n.67, 124 S. Ct. 619, 678 n.67, 157 L. Ed. 2d 491 (2003) (internal quotations and citation omitted). A Section 527 "political organization need not declare contributions, dues, or fund-raising proceeds as income if the organization uses this money for the influencing or attempting to influence the selection, nomination or appointment of any individual to any Federal, State or local public office." *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003) (internal quotations and citation omitted).

According to documents filed by ASK with the IRS, during the period from August 20, 2004, to December 31, 2004, ASK received contributions that totaled $3,623,500.[42] Public records show that out of the total contributions received by ASK, Mr. Blankenship personally contributed $2,460,500. The remaining contributions, totaling $1,163,000, were given by other individuals and organizations. Ac-

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[42] This information is available to the public through the website of the Internal Revenue Service. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22903'&criteriaName='And+For+The+Sake+Of+The+Kids'.

cording to ASK founder, Dr. Dan McGraw, "We are transparent about who we are and who we receive money from. . . . We are allowing Warren McGraw's record to come under scrutiny." Juliet Terry, *Attack Ads Dominate Court Race*, The State Journal, 10/22/04.

ASK spent an unknown amount of its contributions during the general election period "running ads assailing [Justice] McGraw's vote in a 3-2 court edict that reinstated probation for convicted child rapist Tony Dean Arbaugh." Mannix Porterfield, *For the Sake of Kids gets $2.5 Million*, Register-Herald, October 15, 2004.[43] In *Arbaugh*, the Court's majority opinion indicated that defendant would be allowed to work as a janitor in a local Catholic school, but after school officials learned of the defendant's sexual assault record, he was prevented from working at the school. *See State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004).[44]

As a result of ASK's efforts to defeat Justice McGraw[45], and because of Mr. Blankenship's contributions to ASK, the Appellees contend that these in-

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[43] Reproduced at http://www.wvcag.org/news/fair_use/2004/10_15.htm.

[44] Although the *Arbaugh* case had an impact, the speech at Racine had a more fundamental impact on the general election. The *Arbaugh* decision was used during the Democratic Primary by those opposed to former-Justice McGraw's election, but former-Justice McGraw nevertheless defeated his opponent, Circuit Judge Jim Rowe, in the Democratic Primary.

[45] In failing to understand the fundamental role which the speech at Racine had in former-Justice McGraw's defeat, Appellees simply presume the absolute effectiveness of ASK's campaign.

direct and independent acts constitute grounds for my recusal from the instant case. I disagreed with the Appellees' motions seeking to have me recuse myself because I had no role and no control in anything that ASK did during the campaign; nor did I have any role in causing Mr. Blankenship or anyone else to contribute to ASK or otherwise do or not do anything in the 2004 Supreme Court election. The federal statute under which ASK operated expressly permitted it to obtain donations that could be used to attempt to defeat anyone running for a local, state, or federal office. *See McConnell v. Federal Election Comm'n*, 540 U.S. at 174 n.67, 124 S. Ct. at 678 n.67, 157 L. Ed. 2d 491. The fact that ASK invoked its federal right to take a position against Justice McGraw is not a valid evidentiary basis upon which to establish that I could not fairly and impartially decide the merits of the instant case.

E. Lawful Campaign Contributions by Party or Attorney Not Sufficient to Disqualify Judicial Officer from Case

In this case neither ASK nor Mr. Blankenship are parties. Even if they were, the mere fact that they contributed money to defeat Justice McGraw is an insufficient reason alone to disqualify me, much less to require disqualification on a constitutional basis. On this point, the law is clear.

"[C]ampaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment." *Public Citizen, Inc. v.*

Bomer, 115 F. Supp. 2d 743, 746 (W.D. Tex. 2000).[46] This is to say that "a judge is not required to disqualify himself or herself based solely on an allegation that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge." *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. Ct. App. 2007) (citation omitted). *See also Cherradi v. Andrews*, 669 So. 2d 326, 327 (Fla. Ct. App. 1996) ("Judges are not required to disqualify themselves solely upon an allegation that an attorney for a party had made a campaign contribution to the judge's political campaign."); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 640, 644-45, 5 P.3d 1059, 1062 (2000) ("In the context of campaign contributions, we have recognized that a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification. Indeed, we commented that such a rule would 'severely and intolerably' obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign contributions."); *In re Disqualification of Burnside*, 113 Ohio St.3d 1211, 1212-

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[46] Courts considering disqualification motions related to direct contributions to the campaigns of judicial candidates have consistently recognized that ". . . judges are not required to disqualify themselves based solely upon the allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse. As long as the citizens . . . require judges to face the electorate, either through election or retention, the resultant contributions to those campaigns . . . are necessary components of our judicial system." *Nathanson v. Korvick*, 577 So.2d 943, 944 (Fla. 1991) (quoting *MacKenzie v. SuperKids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990).

13, 863 N.E.2d 617, 619 (2006) ("[E]lected judges are generally not required to recuse themselves from cases in which a party is represented by an attorney who has contributed to or has raised money for the judge's election campaign."); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.")

The issue of lawful direct contributions to a judicial candidate's campaign was exhaustively addressed in *Adair v. State, Department of Education*, 474 Mich. 1027, 709 N.W.2d 567 (2006), as follows:

> That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice in Michigan in modern times who has not received campaign contributions from such persons. Nor is there a justice whose opponents have not received campaign contributions from such persons. And, increasingly, "opposition" campaigns have arisen in which contributions are specifically undertaken against particular justices. It is simply impossible for the Supreme Court, as well as most other courts in Michigan, to function if a lawful campaign contribution can constitute a basis

for a judge's disqualification. For if a contribution to a judicial candidate can compel a judge's disqualification, then a contribution to an opponent, or the funding of an opposition campaign, must operate in a similar fashion. If so, it would be a simple expedient for a party or a lawyer to "mold" the court that will hear his or her cases by tailoring contributions and opposition contributions.

Even more fundamentally, however, "We, the people, of the State of Michigan," through the Constitution, have created a system of judicial selection in our state in which candidates are nominated by, and elected through, a political process. It is a different system of judicial selection than that which exists in other states and in the federal system, and reasonable persons can debate the merits and demerits of this system. Each of us in different forums has urged various reforms of this system. Nonetheless, the present system has been ordained by our Constitution, and it defines the environment in which those aspiring to judicial office must undertake their efforts.

The premise of our system of judicial selection in Michigan is that judges will periodically be held accountable for their performance. There are no lifetime appointments to judicial positions, and there are no unaccountable committees who determine whether judges should be maintained in office. Thus, the most notable strength of our system of judicial selection is that it requires candidates for judicial office to go out among the electorate and explain why they should

be placed in office. This system fosters communication with the electorate, speechmaking, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred.

Such campaigns must be directed toward an electorate. . . . In the case of Supreme Court justices, such campaigns will typically involve the expenditure of hundreds of thousands, or even millions, of dollars on television, radio, newspaper, and other advertising, with opposition campaigns expending similar amounts. These expenditures are not funded magically, but are raised from among the electorate, and from organizations that represent those among the electorate.

Indeed, given the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns he poorly funded and result in candidates securing election on the basis of little more than a popular surname.

There will simply be no end to the alleged "appearance of impropriety" if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's par-

> ticipation in a case in which a contributor or an opposition contributor is involved. Again, while cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 474 Mich. at 1041-42, 709 N.W.2d at 579-81.

Direct contributions to a judicial candidate's campaign are an insufficient basis, alone, to require disqualification. Therefore, contributions by a third-person to a completely independent campaign – with no ties to the judicial candidate – do not rise to a due process requirement of disqualification.

F. Conclusion

The integrity of judicial decisions is a direct extension of the integrity of the judicial role. The simple invitation to guess about hidden motivations of judges or colleagues on the bench caused by a selective recounting of facts or by the trafficking of innuendo and half-truths serves only to indulge suspicions and doubts concerning the integrity of elected

officials. It serves only politics. It is drama. It is a diversion.

In many cases, including this one, publicity adverse to the judge or justice is a virtual certainty no matter what decision he or she makes. In such cases, judges insufficiently attuned to their judicial responsibilities might readily welcome a baseless request for disqualification as an escape from a difficult case — particularly in a state which selects its judges in partisan elections. The public is legitimately entitled to more — they are entitled to judicial integrity and courage. To surrender to such recusal temptations would justly expose the judiciary to public contempt. It is the obligation of officers of the court system to ensure that professionalism, not partisanship, guides their actions and that cases are decided on the basis of the law, not in spite of it.

The determination of the composition of an appellate court panel by a standard merely of "appearances" seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day — a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations. Actual justice would be replaced by a justice borne of political gimmickry such as push-polls and media campaigns – all designed to replace judicial independence and integrity with something more to the liking of individual litigants or others with vested interests in specific outcomes. The rule of law would be replaced by the rule of expediency; judges would be forced to practice a "defensive" form of politically correct jurisprudence; and those without money or standing would be at the mercy of those with the power to manipulate and the willingness to impugn judges not to their liking.

It is perhaps an unfortunate aspect of timing that the pendency of the rehearing of this appeal has coincided with the pendency of a rigorous political campaign for two of five seats on this Court. During periods when change is possible in the philosophical direction of the Court, the temptation by pundits, members of the media, litigants, candidates, special interest groups, or even members of this Court to politicize this Court and its decision is present. Although this Court has endured for 145 years, election cycles can be unsettling to the stability and predictability of the rule of law.[47] This puts a heavy burden

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[47] Recent election cycles involving seats on this Court have highlighted some of the difficulties incumbent in a system which incorporates partisanship or politics in its selection method, particularly when political rhetoric is generated from within this Court during an election cycle in which the Justice is not running. *See generally Matter of Starcher*, *supra* (admonishment of judicial candidate for Supreme Court of Appeals for personal solicitation of public support in violation of Code of Judicial Conduct) during 1996 election cycle; *State ex rel. Carenbauer v. Hechler*, 208 W. Va. at 600, 542 S.E.2d at 421 (Starcher, J., dissenting, n. 1: "As I file this dissent, there are eerie parallels between the majority's creation of a rule in the instant case that deprives the voters of West Virginia of their right to vote for a candidate – and the decision by a 5-to-4 majority of the United States Supreme Court to create a rule that prohibits the hand count of machine-rejected ballots in the Florida Presidential election, a procedure that is clearly authorized by state law and is as established and as American as apple pie!") during the 2000 election cycle; *Starcher Defends Behavior at Forum – Candidate Debate Turns Into Argument at State Bar Association Gathering*, The State Journal, March 25, 2004 (recounting shouting outburst from the back of the room by non-candidate Justice during 2004 Supreme Court candidate forum directed against candidate Judge Jim Rowe before members of the West Virginia Bar Association and the Kanawha County

on the members of this Court to act in the highest standard of judicial professionalism, to refrain from exacerbating tensions, to avoid the highly emotional, to abstain from that which is deeply divisive, and to work judicially and judiciously.

[Footnote continued from previous page]

Bar Association, and also separate confrontation between same sitting Justice and candidate Judge Rowe in public mall. "'I've got to admit. It kind of threw me a little. Starcher's back there screaming, so what do you do? You move on,' Rowe said, 'I think it was totally inappropriate. And, in my opinion, it made him look bad.'" "The following week, Starcher said he does not regret speaking up the way he did. . . . Starcher believes his actions were completely within his rights. 'As a sitting justice, I don't park my rights at the courthouse,' he said.") during the 2004 election cycle.

Indeed, the frustrations caused to dedicated jurists by political rhetoric and partisan machinations from within the judiciary is not new, as reflected by Justice Scott, joined in the majority by Judges Jolliffe, Fox and Keadle (all imminently well-respected senior- and current-circuit court judges in this State):

> Finally, we would be less than forthright if we did not acknowledge the effects this candidacy has had on the ability of this Court to conduct its constitutionally-required duties with the element of collegiality necessary to properly effect judicial decision-making. While the process of judicial decisions implies disagreement, it also implies that the parties to such decisions must approach dispassionately the business of dispute resolution without personal animosity and with a healthy respect for honest differences of opinion. Unfortunately, this candidacy has brought with it an unhealthy pall of partisanship. [Footnote omitted.] The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.

State ex rel. Carenbauer v. Hechler, 208 W. Va. at 420, 542 S.E.2d at 599. Justice Starcher dissented.

Resort to appearance-based criteria alone in judging simply encourages the excesses often wrought on a judicial system during times of political struggle. "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance – for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." *United States v. Rabinowitz*, 339 U.S. 56, 86, 70 S.Ct. 430, 444, 94 L.Ed. 653 (1950) (J. Frankfurter, dissenting), *overruled, in part, Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). *See also Rogers v. Bellei*, 401 U.S. 815, 837, 91 S.Ct. 1060, 1072, 28 L.Ed. 2d 499 (1971) (J. Black, dissenting) (legal standards "should not be blown around by every passing political wind that changes the composition of this Court.").

Just as judges have a duty to the system, so too do counsel in cases appearing before the courts of this State. While counsel must endeavor to represent their clients zealously, they should do so with due regard to the profession they serve. I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. While such filings are appropriate when warranted, counsel should do so within the framework which has long served this judicial system. Such motions should include all facts material to the recusal decision. Omitted from the motions herein was any objective consideration of my actual record, my decisions and my behavior in over three years on this Court – the truest measure of a judge. Further, while the use of the term "support" is certainly permissible in a motion, the term, in a vacuum, can be misleading and

its connotation remarkably subjective and indefinite. It is a term better given to political punditry and press releases than, in the context of this case, the objective certainty needed in legal discourse. The well-drafted motion should acknowledge and discuss not only the motion's perceived strengths, but also the motion's actual weaknesses. The absence of such a critical analysis here, indeed the lack of even an acknowledgment of the motions' actual weaknesses, is directly relevant to the legal credibility of the said motions.[48] It is my purpose here to remind counsel appearing before this Court of their obligations to this Court and this judicial system.[49]

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[48] In a system dedicated to seeking actual justice, the absence of something so material as my actual record on this Court, my decisions and my behavior as a judge is so common-sense that its omission is disappointing. Further, the use of a survey which sounded more like a "push-poll", particularly long after the deadline for filing such a motion had passed and after the case was argued orally before this Court on rehearing, was not only disappointing, but also problematic if the purpose of the motion was legal in nature.

[49] This election period saw a great deal of misinformation. For example, it was erroneously reported that this Court diverted from its traditional rotation for the position of Chief Justice. Specifically, it was reported that members of this Court improperly rotated myself into the Chief Justiceship after current-Chief Justice Maynard when that position should have instead gone to Justice Albright. Attached as Exhibit 1 is a chart by the Court's Clerk, Rory Perry, detailing the rotation and dispelling any contention that I was improperly placed in rotation before Justice Albright. Indeed, the contrary argument simply makes no sense. Since this rotation has been in place, no justice has waited more than four years before becoming Chief Justice in their fifth year. As set forth by the current rotation, next year, my first as Chief Justice, will be my fifth year. Furthermore, the moment I took my place in rotation, Justice

In conclusion, I observe the note of caution expressed by now-Justice Stephen Breyer, who, while a judge on the First Circuit Court of Appeals, noted that "the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original) (citations omitted). For this reason, a "judge must still tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding the appearance of partiality, while simultaneously remaining aware of the poten-

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[Footnote continued from previous page]

Albright became Chief Justice in 2005. At that point, the rotation was C.J. Albright (2005), J. Davis (2006), J. Starcher (2007), J. Maynard (2008) and J. Benjamin (2009). To contend that somehow Justice Albright should have left his Chief Justiceship at the end of 2005 and somehow moved to the middle of the rotation line to place him as Chief Justice in 2009 is, frankly, absurd.

Unfortunately, this misinformation has taken on a life of its own. Moreover, some have insinuated that there was some form of conspiracy to place me behind Justice Maynard in rotation to affect the selection of replacement judges herein for those justices who have recused themselves. Such assertions are disturbing and grossly unfair to the two outstanding jurists, Judges Fox and Cookman, who served on this case and who are among the most highly-regarded jurists this State has ever produced. Judges and attorneys have an obligation to deal in facts, not conspiracy theories, lest their motives in pleadings and pronouncements come into question.

tial injustices that may arise out of unwarranted disqualification." *Id.*

For these reasons, I concur in the Majority opinion.

Membership of Supreme Court of Appeals Each Year, 1972 – present Names in **CAPITALS** denote Chief Justice for that year (1980 was first year of CJ rotation by seniority, per attached order of Dec. 6, 1979)

Year	Members of the Court				
1972	Berry	Caplan	Calhoun/ Haden	Kessel	Carrigan
1973	Berry	Caplan	Haden	Sprouse	Neely
1974	Berry	Caplan	Haden	Sprouse	Neely
1975	Berry	Caplan	**HADEN**	Flowers	Neely
1976	**BERRY**	Caplan	Wilson	Flowers	Neely
1977	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1978	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1979	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1980	Miller	Caplan	McGraw	Harshbarger	**NEELY**
1981	Miller	McHugh	McGraw	**HARSHBARGER**	Neely
1982	**MILLER**	McHugh	McGraw	Harshbarger	Neely
1983	Miller	McHugh	**McGRAW**	Harshbarger	Neely
1984	Miller	**McHUGH**	McGraw	Harshbarger	Neely
1985*	**MILLER**	McHugh	McGraw	Brotherton	**NEELY**
1986	**MILLER**	McHugh	McGraw	Brotherton	Neely
1987	Miller	McHugh	**McGRAW**	Brotherton	Neely
1988	Miller	**McHUGH**	McGraw	Brotherton	Neely

* Notes on 1985, 1994-1995 and 2007: In 1985, Richard Neely served as Chief Justice through June 28, when Thomas Miller took over for the remainder of the year. In 1994, William Brotherton served as Chief until he suffered a heart attack in September. Richard Neely was Acting Chief for the remainder of 1994, and continued as Chief in 1995 until his resignation on April 15, when Thomas McHugh took over as Chief for the remainder of the year. On October 26, 2006, the rotation order was changed when Robin Davis was designated as Chief for a second year (2007) and Elliott Maynard was designated as Chief for 2008.

Other notes: As of November 20, 2007, the Chief Justice has been designated through the close of 2010, to-wit: Maynard 2008; Benjamin 2009; Albright 2010. When a current Chief Justice is unable to act, the next chief in line serves as the Acting Chief Justice.

1989	Miller	McHugh	Workman	**BROTHERTON**	Neely
1990	Miller	McHugh	Workman	Brotherton	**NEELY**
1991	**MILLER**	McHugh	Workman	Brotherton	Neely
1992	Miller	**McHUGH**	Workman	Brotherton	Neely
1993	Miller	McHugh	**WORKMAN**	Brotherton	Neely
1994*	Miller/ Cleckley	McHugh	Workman	**BROTHERTON**	**NEELY**
1995*	Cleckley	**McHUGH**	Workman	Albright	**NEELY**/ Recht
1996	Cleckley/ Davis	**McHUGH**	Workman	Albright	Recht
1997	Davis	McHugh	**WORKMAN**	Starcher	Maynard
1998	**DAVIS**	McCuskey	Workman	Starcher	Maynard
1999	Davis	McGraw	Workman/ Scott	**STARCHER**	Maynard
2000	Davis	McGraw	Scott	Starcher	**MAYNARD**
2001	Davis	**McGRAW**	Albright	Starcher	Maynard
2002	**DAVIS**	McGraw	Albright	Starcher	Maynard
2003	Davis	McGraw	Albright	**STARCHER**	Maynard
2004	Davis	McGraw	Albright	Starcher	**MAYNARD**
2005	Davis	Benjamin	**ALBRIGHT**	Starcher	Maynard
2006	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2007*	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2008	Davis	Benjamin	Albright	Starcher	**MAYNARD**
2009	Davis	**BENJAMIN**	Albright		
2010	Davis	Benjamin	**ALBRIGHT**		
2011	Davis	Benjamin	Albright		
2012	Davis	Benjamin	Albright		
2013		Benjamin			
2014		Benjamin			
2015		Benjamin			
2016		Benjamin			

Compiled by Rory Perry
Updated on November 20, 2007

Exhibit 1

AMICUS CURIAE BRIEF

No. 08-22

In the

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.

Respondents.

On Writ of Certiorari to the
West Virginia Supreme Court of Appeals

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MICHIGAN, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Marc James Ayers
Andrew L. Brasher
Michael B. Duffy
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Counsel for *Amici Curiae*

(Additional Counsel for *amici curiae* are listed inside the front cover.)

ADDITIONAL COUNSEL

John W. Suthers
Attorney General
STATE OF COLORADO
1525 Sherman St.
Seventh Floor
Denver, CO 30203

Richard S. Gebelein
Chief Deputy
Attorney General
STATE OF DELAWARE
Department of Justice
820 N. French Street
Wilmington, DE 19801

Bill McCollum
Attorney General
STATE OF FLORIDA
Office of the
Attorney General
The Capitol, PL-01
Tallahassee, FL 32399

Buddy Caldwell
Attorney General
STATE OF LOUISIANA
Louisiana Department
of Justice
P.O. Box 94005
Baton Rouge, LA 70804

Michael A. Cox
Attorney General
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

Mark L. Shurtleff
Attorney General
STATE OF UTAH
Utah State Capitol Ste. 230
P.O. Box 142320
Salt Lake City, UT 84114

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BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MICHIGAN, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici* States employ a variety of different judicial-selection methods. Three of the *amici* elect all of their judges—two in partisan elections, one in nonpartisan elections. Three of the *amici* select their judges through an appointment process—one by gubernatorial appointment from among nominating-commission recommendations, two by gubernatorial appointment with senate consent. And one of the *amici* elects trial-court judges but appoints appellate-court judges. In six of the *amici* States, a judge's retention in office is determined through election; in one, retention is subject to gubernatorial re-appointment. Despite these and other policy differences, the *amici* States share a common commitment to ensuring the fairness of their courts and the impartiality of their judges.

Amici do not appear here either to defend or to critique the wisdom of Justice Benjamin's refusal to recuse himself from the dispute between Caperton and Massey Coal. Reasonable minds can and will disagree about whether, on the particular facts presented, recusal would have been the better course. And in a way, that is precisely the point. As this Court has said time and again, there is a gulf between the arguably unwise and the unconstitutional. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 207-08 (2003); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988). From *amici*'s perspective, therefore, the

question is not whether, in some abstract sense, Justice Benjamin "should" have disqualified himself. The question, rather, is whether the Court should fashion an entirely new body of federal constitutional law to govern day-to-day recusal practice in state courts—and, in the process, birth an entirely new species of litigation pleading, the "*Caperton* motion." The answer on both counts is no.

If ever there were a case that proved the truth of Justice Holmes' dictum about "hard cases" threatening "bad law," this is it. Holmes' precise words were these:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (dissenting opinion).

Like the case about which Justice Holmes was concerned, this case has "excited [the] public attention." *Id.* at 401. *See, e.g.*, Editorial, *Too Generous*, New York Times, at WK8 (Sept. 7, 2008) ("The United States Supreme Court should add the Massey case to its docket for the upcoming term and throw out the court's tainted ruling."); Editorial, *West Virginia Supreme Court Justice Brent Benjamin Has Become a National Symbol of*

Questionable Justice, Charleston Gazette, at A4 (Jan. 8, 2009) ("In view of th[e] overwhelming barrage [of public criticism]—also voiced by major law journals and national newspapers—we can't imagine that the U.S. Supreme Court will allow Benjamin's participation to stand."). Clearly, what Justice Holmes called the "hydraulic pressure"—here to reverse, by any means necessary—has been building for some time. The *amici* States appear here to ensure that the Court does not make bad law based on what some may perceive to be the hard facts of this case.

SUMMARY OF THE ARGUMENT

1. States have an overriding interest in ensuring the fairness of their courts and the impartiality of their judges. Historically, States have been free to police judicial bias—both real and apparent—through statutes, rules, and bar codes. The Due Process Clause has not required recusal except in the most extreme cases—namely, where a judge either has a pecuniary "interest in the outcome of" a case or is "actually bias[ed]" against one of the parties. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Petitioners' position here—which would require recusal as a matter of federal constitutional law whenever a judge might feel a "debt of gratitude" to an interested party that suggests a "probability of bias"—would carry the Court well beyond existing due-process doctrine and make virtually every state-court recusal dispute a "federal case." Because petitioners' proposed extension is neither necessary nor wise, the Court should reject it.

2. There is no pressing need to constitutionalize state recusal practice. The States (1) are uniquely well-

situated to regulate recusal practice in their own courts and (2) have been both vigorous and innovative in doing so.

a. Review of the 50 States' court systems and judicial-selection methods—as well as the widely divergent public expectations that have grown up around them—reveals kaleidoscopic variety. Petitioners' attempt to shoehorn that variety into an overarching federal constitutional standard makes little practical sense. It would be far better to leave the particulars of state recusal practice to state policymakers, who are intimately familiar with the often state-specific "facts and circumstances" that will control disqualification determinations.

b. States "are free to impose judicial disqualification standards that are more rigorous than those mandated by the Due Process Clause," and, "with few exceptions, they have done just that." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007). Reflecting the diversity inherent in our federal system, the States have tackled the recusal issue using a variety of mechanisms. Even beyond the ABA's prophylactic model-code requirement that a judge recuse "in any proceeding in which [his] impartiality might reasonably be questioned"—which virtually every State has adopted—a number of States have experimented with additional, and often novel, regulations. Those include, among others, (1) "peremptory-recusal" rules; (2) campaign-contribution limits; (3) public-financing options; and (4) contribution-based disqualification requirements. Given their historical and ongoing activity, there simply is no evidence of any systemic

breakdown that would justify creation of new federal constitutional doctrine.

3. Petitioners' proposed constitutional recusal rule is not only unnecessary, but also unwise. It would be hopelessly inadministrable, both doctrinally and practically.

a. The lone "principle" that petitioners identify—that recusal is constitutionally required where the circumstances indicate a "debt of gratitude" that may create a "probability of bias"—is really no principle at all. There are two key problems. First, petitioners' position has no logical stopping point. For instance, although clearly aimed at elected judges, petitioners' "debt"-based theory would seemingly apply *a fortiori* to appointed judges, whose principal backers (starting with the executives who appointed them) are particularly conspicuous. Second, rarely if ever will it be self-evident when the requisite "debt" exists, let alone when that "debt" gives rise to an impermissible "probability of bias." Rather, the constitutional determination will inevitably devolve into a multifactor morass. Indeed, petitioners and their *amici* propose a series of different multifactor tests; altogether, they suggest nearly 20 pertinent (but nonexclusive) considerations. While that sort of hypercontextualism may well be appropriate to legislative policymaking on the state level, it is not the stuff of which constitutional doctrines should be made.

b. Petitioners' proposed due-process rule would unduly burden the courts, cause judges to "over-recuse" *en masse*, and encourage litigant mischief.

1. Were it to recognize petitioners' novel constitutional claim, this Court would birth a new species in litigation practice: the "*Caperton* motion." Given the

seeming breadth of the underlying right, *Caperton* motions would fly fast and furious. And given the right's unwieldiness, resolution of those motions would gum up the state litigation process by requiring judges (1) to allow discovery into the pertinent considerations, (2) to slog through laundry lists of case-dependent factors, and, in all likelihood, (3) to refer their recusal decisions to their colleagues for independent review. In addition, reversal here would both thrust this Court into the mix by making it the ultimate arbiter of state-court disqualification disputes and spawn additional collateral (*e.g.*, habeas) litigation in the lower federal courts. It is no answer to say that *Caperton* recusals will be required only in "exceptional" circumstances. Every litigant will contend that his case is exceptional.

2. Even as matters stand now, judges face extraordinary psychological pressure to recuse. *See Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 929 (2004) (Scalia, J.). Introducing the Constitution into the equation would up the ante significantly. It seems scarcely debatable that if faced with accusations of oath-breaking for every supposed "debt," no matter how ill-defined, judges would defensively recuse even in cases in which recusal is not appropriate.

3. Increasingly, litigants manipulatively employ the recusal procedure as a judge-shopping device. Far from helping to remedy that abuse, petitioners' indeterminate "debt"-based due-process rule would actually facilitate it.

ARGUMENT

I. Petitioners' Proposal To Constitutionalize The Great Bulk Of State-Court Recusal Practice Contradicts Vital Principles Of Federalism.

Policing the fairness of the state judicial process is a core state function. In particular—and most importantly for present purposes—the States have a compelling interest in "ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person ...." *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("Judicial integrity is ... a state interest of the highest order.").

Because "most questions concerning a judge's qualifications to hear a case are not constitutional ones," States have traditionally been free to regulate judicial bias and its appearance through their own "common law, statute[s], or ... professional standards of the bench and bar." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). To be sure, this Court has identified several discrete categories of cases in which a judge's participation would *ipso facto* violate the federal Constitution. To be clear, though, disqualification is "constitutionally required" only "in the most extreme of cases." *Aetna Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). In particular, the Due Process Clause requires a judge to recuse—

- when he has "a direct, personal substantial pecuniary interest" in the case such that he becomes the judge in his own cause, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *accord Ward v. Village of*

Monroeville, 409 U.S. 57, 57-62 (1972); *Lavoie*, 475 U.S. at 821-25;

- when he is impermissibly serving in dual roles as both prosecutor and adjudicator, *see In re Murchison*, 349 U.S. 133, 136-39 (1955); or

- when, in unique circumstances arising out of contempt proceedings, he has become "embroiled in a running, bitter controversy" with a litigant, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *accord Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

As the Court succinctly summarized existing doctrine in *Bracy*, the constitutional "floor" established by the Due Process Clause "requires a 'fair trial in a fair tribunal' before a judge with no [1] actual bias against [either party] or [2] interest in the outcome of [the] particular case." 520 U.S. at 904 (internal citations omitted).

Petitioners and their *amici* now ask the Court to venture well beyond existing doctrine and to construct "a new paradigm for the application of due process." Former Chief Justices and Justices ("FCJJ") Br. 3. In particular, petitioners invite the Court to decree *as a matter of federal constitutional law* that, actual bias or financial interest aside, a judge must recuse whenever the circumstances suggest that he might feel a "debt of gratitude" to an interested party that gives rise to a "probability of bias." Pet. Br. *passim*. The Court should decline the invitation.

This Court has been reluctant to interpret the Constitution in novel ways so as to invade areas historically regarded as the "province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (rejecting due-process chal-

lenge); *see also, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (plurality opinion) (same). And with good reason. Pursuant to settled principles of federalism, the States have plenary authority to regulate conduct within their borders except to the extent that either the federal government has clearly preempted that authority or the federal Constitution clearly forbids them to exercise that authority. Accordingly, before displacing state regulation in an area of traditional state concern—particularly under a constitutional provision as open-textured as the Due Process Clause—it should at the very least be clear (1) that there is a compelling need for a constitutional fix and (2) that the fix is one that can be sensibly administered.

Here, neither essential prerequisite is satisfied. There is no warrant for removing recusal issues from the States and making every recusal dispute, as it were, a "federal case." And indeed, given the overwhelming line-drawing problems inherent in any "debt"-based due-process rule of recusal, there are compelling reasons not to constitutionalize the enterprise.

II. Constitutionalization Is Unnecessary: The States Are Well-Situated To Regulate Recusal Practice In Their Own Courts And Have Been Vigilant In Doing So.

Petitioners and their *amici* present the Court with a choice: Either adopt a sweeping new federal constitutional rule governing recusal or "relegate parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them." Pet. Br. 23. Indeed, they say, "without this Court's intervention," recusal itself "is in danger of becoming a nullity ...." Brennan Center Br.

25-26. But the all-or-nothing choice they present—between constitutionalization and chaos—is a false one. The *reason* that "judicial disqualification decisions are rarely made on due process grounds" is "because both Congress and state legislatures are free to impose judicial disqualification standards that are more rigorous than those mandated by the Due Process Clause—and because, with few exceptions, they have done just that." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007). Before extending the Due Process Clause's reach and attempting to impose an across-the-board federal constitutional standard on the several States (and their various judicial-selection systems), this Court should satisfy itself, at the very least, that there is a serious problem that demands redress and, further, that the States have failed—on a systemic basis—to engage it. Here, that threshold condition to federalization is not met.

A. The States Are Uniquely Well-Situated To Regulate Recusal Practice In Their Own Courts.

Petitioners and their *amici* are asking the Court to step in to decree a new federal constitutional rule specifying when support for a particular judge's election or appointment creates a "debt of gratitude" that gives rise to a "probability of bias" that, in turn, requires the judge to recuse. Petitioners' position rests on one of two possible premises: Either support for a judge's candidacy *always* gives rise to a "debt" that triggers an obligation to recuse, or it *sometimes* does. Petitioners expressly (and sensibly) deny the former possibility (Pet. Br. 26), so it must be the latter. That seems to us self-evidently correct: *Sometimes* a litigant's or lawyer's support for a

judge will be of such a quality (or quantity) that it will give rise to doubts about the judge's ability to decide the issues fairly and, accordingly, will warrant the judge's disqualification. The question then becomes: Who decides at what point the supposed "debt" has become too great, and by reference to what?

Petitioners want to federalize the recusal issue. They believe that the Due Process Clause should provide the benchmark. The *amici* States respectfully disagree. Recusal has always been, and will always be, a highly contextualized issue. The recusal inquiry "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, C.J.). Given the enormous variety (of which more below) among the 50 States' justice systems and judicial-selection methods—and the widely divergent expectations of the States' respective citizenries that have grown up around them—it makes no sense to require the "reasonable observer" to do his observing through a single, federal lens. Most of the "facts and circumstances" that will control recusal determinations in *state* courts exist (not surprisingly) at the *state* level. The Conference of Chief Justices has nicely captured the point:

> What is exorbitant in a small city like The Dalles, Oregon, may be unremarkable in a metropolitan jurisdiction like Dallas, Texas. ... [A]n amount of support that is outrageous in a State like Minnesota, which has for many decades had only low-key judicial contests, might be routine in a

> smaller State, like Alabama, where multi-million dollar races are frequent.

CCJ Br. 25-26.

If that is correct, which we think it is, it weighs heavily against a uniform federal constitutional rule. If the "reasonable observer" must take into account State-to-State differences in deciding on which side of the "sometimes" line a particular item of support falls—whether or not it gave rise to a "debt of gratitude" that, in turn, created a disqualifying "probability of bias"—surely it makes more sense to leave recusal specifics to state policymakers, who are intimately familiar with state history and practice, as well as citizens' collective expectations.

B. States Have Historically Regulated Recusal Practice In Their Own Courts And Continue To Experiment With Novel Regulatory Approaches.

Consistent with the principle of separated sovereignty, Congress and the States are free (within broad limits) to "overprotect" constitutional rights. And in fact, both have done so with some regularity. Among the more notable congressional efforts are Title VII of the Civil Rights Act of 1964, which effectively extends equal-protection principles to disparate-impact claims, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), and the Religious Freedom Restoration Act, which effectively extends First Amendment protections to cases involving generally applicable federal laws that incidentally burden religious exercise, *see* 42 U.S.C. §2000bb. For their part, a number of States, for instance, have passed mini-RFRAs to extend free-exercise rights to persons

challenging neutral, generally applicable state and local laws.[1] So too, in the wake of this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), more than half the States enacted statutes to extend private property owners' rights against government takings beyond the Fifth Amendment baseline.[2]

In the same way—and as particularly relevant here—States are free to "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." *Republican Party of Minn.*, 536 U.S. at 794 (Kennedy, J., concurring). Perhaps not surprisingly, the States have done exactly that. Indeed, "every State ha[s] devised [its] own set of laws, rules, practices, procedures and/or precedents to govern challenges to judges in particular matters." CCJ Br. 14. Of course, because the States' court systems, judicial-selection methods, and political histories vary, state recusal rules are not identical in every jot and tittle. But that is hardly a cause for embarrassment; "[d]iversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system." *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (Scalia, J., concurring). *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic expe-

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[1] *See Congress Enacts Religious Land Use Law; Three More States Adopt RFRAs*, SG040 A.L.I.-A.B.A. 757, 764 (2001).

[2] *See* National Conference of State Legislatures, *Eminent Domain: 2006 State Legislation*, http://www.ncsl.org/programs/natres/ emindomainleg06.htm (visited Feb. 1, 2009).

riments without risk to the rest of the country."). The point is that in their own ways, based on their own experiences, and responding to the circumstances, needs, and expectations of their own constituencies, the States have set out to ensure judicial fairness through a variety of mechanisms—some conventional, others decidedly more experimental. A few examples follow.

1. *Recusal Codes and Statutes.* The American Bar Association's Model Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." ABA Model Code of Judicial Conduct Rule 2.11(A) (2007). That rule "has been adopted in some form in virtually every state." ABA Br. 14. "Reasonabl[eness]," of course, will depend on all manner of facts and circumstances particular to the adopting State. But this bedrock protection against even apparent judicial bias, which goes well beyond common-law requirements (Resp. Br. 15-19), is now firmly rooted in state law and practice.

2. *"Peremptory Recusal" Rules.* In addition to the baseline ABA-recommended recusal provision, nearly 20 States currently permit litigants "peremptory" challenges to judges. These peremptory-recusal rules typically enable each party to move to disqualify one judge per proceeding without cause. *See* Flamm, *supra*, at 789-822 (citing and discussing rules).

3. *Contribution Limits.* Nearly every State that elects judges has enacted campaign contribution limits of one form or another. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, http://www.judicialselection.us/judicial_selection/

campaigns_and_elections/campaign_financing.cfm?state (visited Feb. 1, 2009). Notably, proving that the size of an eyebrow-raising contribution will necessarily vary from one community to the next, the States' caps on individual donations to high-court candidates range from $310 in Montana to $10,000 in Wisconsin. *Compare* Mont. Admin. R. 44.10.338 *with* Wis. Stat. Ann. §11.26.

4. *Public Financing.* Several States have already begun to experiment with forms of public financing for judicial elections. *See* N.M. Stat. §1-19A-1 *et seq.*; N.C. Gen. Stat. §163-278.61 *et seq.*; Wis. Stat. Ann. §11.50. And as one of petitioners' *amici* has reported, "Other states are considering following suit. Legislative leaders in Georgia, Illinois, Michigan, Montana and Washington [recently] put forward their own proposals for public financing of their state's high court elections." Justice At Stake, *The New Politics of Judicial Elections 2006* at 39, http://www2.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf (visited Feb. 1, 2009).

5. *Contribution-Based Recusal Rules.* A number of States have adopted ethical rules that expressly link recusal to campaign contributions. Not surprisingly—indeed, appropriately—they have done so in slightly different ways. Alabama's legislature, for instance, has adopted a firm disqualification rule that (1) requires a trial judge to recuse from any case involving a litigant or lawyer who contributed more than $2000 to his election campaign and (2) requires an appellate judge to recuse when a litigant's or lawyer's contribution exceeded $4000. *See* Ala. Code §§12-24-1, -2. Like Alabama, Mississippi has adopted specific monetary benchmarks—$1000 for trial judges and $2000 for appellate judges. *See* Miss. Code of Jud. Conduct, Canon 3E(2), commen-

tary. Unlike Alabama, Mississippi has made such "major don[ations]" relevant to, but not decisive of, the recusal question. *Id.* Notably, Mississippi opted for a more flexible rule because it concluded that "political donations may but do not necessarily raise concerns about a judge's impartiality." *Id.*

A number of other States, including West Virginia, have promulgated rules that, in more general fashion, make campaign contributions "relevant to disqualification." W. Va. Code of Jud. Conduct, Canon 5(C)(2), comment; *accord, e.g.*, Ind. Code of Jud. Conduct, Canon 4.4, comment 3; N.D. Code of Jud. Conduct, Canon 5(C)(2), comment; Tenn. S. Ct. R. 10 (Code of Jud. Conduct), Canon 5(C)(2)(b), comment; Wash. Code of Jud. Conduct, Canon 7(B)(2), comment.[3] And as one of petitioners' own *amici* reports, still other States are now "actively considering new canons to provide much-needed guidance to judicial candidates and their supporters [regarding] when financial support by a party becomes sufficiently high to require a judge or justice to recuse." FCJJ Br. 13-14; *see also* ABA, *Comparison of ABA Model Judicial Code and State Variations: 1/5/09*, http://www.abanet.org/cpr/code/2_11.pdf (visited Feb. 1, 2009).

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[3] The fact that more States have not followed Alabama's lead in adopting fixed numerical recusal triggers should come as no surprise. As even critics of state-court recusal practice acknowledge, "in states with reasonable contribution limits, the potential for real or apparent corruption is largely addressed by the limits, which no individual may legally exceed. Under those circumstances, [a numerical recusal trigger] adds little or nothing to the campaign finance regime to protect a judge's impartiality." Deborah Goldberg, *et al.*, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 529 (2007).

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Clearly, the States are not asleep at the wheel. To the contrary, the States are presently experimenting with different—and often novel—ways of ensuring the impartiality of their own judges. Indeed, West Virginia's actions in the wake of the 2004 election perfectly illustrate the States' nimbleness in dealing with perceived judicial failings. In direct response to the controversy surrounding Justice Benjamin's non-recusal in this case, West Virginia amended its campaign finance laws related to judicial elections. *See* 2005 W. Va. Acts, Ch. 9. The new law requires § 527 groups to register and disclose their financing and, further, establishes a $1000-per-election cap on individual contributions to § 527 groups operating in West Virginia. *See* W. Va. Code §3-8-12. More recently still, the West Virginia legislature proposed a state constitutional amendment creating a three-member "Judicial Recusal Commission" that would issue "binding decision[s] on whether a family court judge, a circuit court judge or a supreme court justice should be recused from hearing, deciding or participating in deciding" a particular case. H.R. J. Res. No. 104, 78th Leg., 2d Sess. (W. Va. 2008).

Given the States' historical and ongoing activity, there simply is no evidence of any systemic breakdown that would justify the creation of new constitutional doctrine. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001) (noting the "dearth of horribles demanding redress" in refusing a "request for the development of a new and distinct body of constitutional law"). By contrast, the States have proven their willingness and ability to carefully regulate recusal-related issues in ways that are responsive to the conditions prevailing in

their own specific communities. Particularly where, as here, "the States are currently engaged in serious, thoughtful examinations" of an important public-policy issue, this Court should be reluctant to silence the democratic dialogue through an act of constitutionalization. *Washington v. Glucksburg*, 521 U.S. 702, 719 (1997); *accord, e.g., Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("[I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) ("[J]udicial imposition of a categorical remedy ... might pretermit other responsible solutions being considered in Congress and state legislatures.").

III. Constitutionalization Would Be Unwise: Petitioners' "Debt"-Based Constitutional Recusal Rule Is Incapable Of Principled Application.

Not only is petitioners' proposed new constitutional recusal rule unnecessary, it is also unwise. It would be hopelessly inadministrable, both doctrinally and practically. Worse, it would create the opportunity for mischief in state-court systems.

A. Petitioners' Proposed Due-Process Rule Would Be Doctrinally Unworkable.

The due-process rule that petitioners suggest—that a judge's "debt of gratitude" can give rise to a federal constitutional obligation to recuse—is not susceptible of sensible administration as a doctrinal matter. This Court is not in the business of issuing "good-for-this-ride-only" decisions. It "must lay down rules that can be followed in the innumerable cases [it is] unable to re-

view." *Mickens v. Taylor*, 535 U.S. 162, 167 n.1 (2002). Before minting a new federal constitutional rule that will supersede existing state practice, the Court should be sure that the rule is capable of principled application. Petitioners' is not.

The lone "principle" that petitioners identify—that recusal is constitutionally required where the circumstances indicate a "probability of bias"—is really no principle at all. It will hardly be self-evident in any particular case when a litigant's or lawyer's support for a judge has created a "debt of gratitude" that, in turn, gives rise to a disqualifying "probability of bias." And the variables that would necessarily inform any "probability" calculus are seemingly innumerable.

Consider, as just one example, how petitioners' "debt"-based theory should apply to each of the various judicial-selection methods currently in force around the country. Trying to get a handle on those methods is itself a dizzying exercise; "[i]f distinctions are parsed finely enough, one can identify almost as many different methods of judicial selection as there are States in the Union." CCJ Br. 5. Looking only at the ways in which States select the judges of their *highest* courts, one finds the following:

- Eight States utilize partisan elections.
- Thirteen States utilize nonpartisan elections.
- One State holds partisan primaries but nonpartisan general elections.

- In thirteen States, the Governor appoints from among nominees selected through a judicial nominating commission ("JNC") or its equivalent.

- In two States, the Governor appoints, but subject to confirmation by the JNC or similar board.

- In one State, the Governor nominates from among JNC recommendations, and the Legislature then formally makes the appointment.

- In two States, the Governor appoints subject to senate confirmation.

- In seven States, the Governor appoints from among JNC nominees, subject to confirmation by the senate (or, in one State, the house and senate).

- In one State, the Governor nominates from JNC recommendations, and an "executive council"—a body separately elected every two years through partisan elections—then formally makes the appointment.

- In two States, the legislature itself makes the selections.[4]

The diversity gets downright kaleidoscopic when one factors in the various methods for selecting lower appellate and trial-court judges, the methods by which state judges and justices are retained, and the methods for filling interim vacancies—many of which differ (1) not

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[4] *See* American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm. (visited Feb. 1, 2009).

only from one State to another but also *within each State* and (2) not only from the methods used to select state high-court justices but also from one another.[5]

This variety matters because, although clearly aimed at elected judges, the logic of petitioners' "debt"-based due-process recusal standard is not so easily cabined; it applies equally to judges chosen through other methods. In this case, petitioners sought Justice Benjamin's disqualification because, they said, he owes his seat on the West Virginia Supreme Court to the election-related activities of Massey's CEO, Don Blankenship. But if Blankenship's expenditures and political advocacy created a "debt of gratitude" sufficient to infer a "probability of bias," then it follows *a fortiori* that an appointed judge would have to recuse himself from cases involving his key supporters. An appointed judge's backers (and opponents, for that matter) are likely to be far more easily identifiable than an elected judge's. For starters, think about the President or Governor who actually taps an appointed judge. If Justice Benjamin was unconstitutionally "indebted" to Massey by virtue of Blankenship's indirect support,[6] how much greater is the "debt" owed by an appointed judge to the chief executive who chose him, specifically, from among dozens (if not hundreds) of qualified eligibles?

Benjamin's election was contingent on a host of factors, most of which were beyond Blankenship's control. Blankenship's advocacy certainly didn't hurt, but it

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[5] *See id.*

[6] Blankenship's participation in the 2004 election was driven more by a desire to defeat then-Justice McGraw than to elect Justice Benjamin. Resp. Br. 3-4, 55.

couldn't cinch the deal, either. *See* Resp. Br. 54 (noting, for instance, that most West Virginia newspapers endorsed Benjamin and that Benjamin's opponent declined all media interviews, refused to debate, and gave one particularly "bizarre speech"). In an ordinary appointment system, by contrast, the chief executive's personal choice is a necessary condition to the judge's elevation. If any judge can be said to owe his office to anyone, then surely it is the appointed judge who owes the executive who selected him. But can it possibly be that an appointed judge must—*as a matter of federal constitutional law*—recuse himself every time his appointer (or, more likely, his appointer's designee) appears before him as a litigant? Common sense and historical practice both confirm that the answer is no.

Of course, the problems for the appointed judge under petitioners' "debt"-based standard wouldn't end with cases involving his appointer. What about, for instance, the legislators who supported his nomination? The administration lawyers who vetted his selection? The private-sector attorneys who wrote letters or testified on his behalf to a legislative or bar committee? Those who actively advocated his appointment or confirmation in the press? "[H]uman nature" being what it is (Pet. Br. 30), surely the appointed judge may feel some "debt of gratitude" to those individuals, too. But just as surely, the Due Process Clause could not possibly require the judge to recuse in every case in which any of them shows up before him as lawyer or litigant. If it did, the business of the courts—including this one—would grind to a halt.

The complications attending the election-appointment vector, alone, should give the Court pause

about embracing petitioners' "debt of gratitude" criterion. But they are just the tip of the iceberg. The variations go on and on. A brief sampling—

- Exactly what kinds of "debts" count, and for how much? What about political and personal debts, as opposed to financial?

- Should it matter whether the support comes from a litigant, a lawyer, or some other interested person?

- Is the support threshold different for judges who represent statewide constituencies than for those whose jurisdiction is more limited?

- How would the calculus apply where a litigant or lawyer has actively opposed (rather than supported) a particular judge's candidacy?

- If an individual is initially appointed or elected to a policymaking position (say, Attorney General) and then later springboards to judicial office, does any "debt" to his early supporters follow him from the statehouse to the courthouse?

- How should courts discount the indebtedness that attaches to independent expenditures as opposed to direct contributions? What about solicitations?

- Of what relevance is the closeness of the election or the competitiveness of the appointment?

- Should a due-process rule treat support offered during the pendency of a case differently from support offered before the case is filed?

There is no need to go on. The point is clear: Petitioners' "debt"-based theory has no principled, logical stopping point.

Seemingly recognizing as much, petitioners and their *amici* retreat to a series of multifactor balancing tests. Tellingly, though, petitioners and their *amici* can't seem to agree on a single set of pertinent considerations. For their part, petitioners emphasize five criteria—the sheer size of Blankenship's expenditures, those expenditures' proportion of Justice Benjamin's total financial support, Blankenship's additional election-related advocacy, the timing of the expenditures, and the nonreviewability of Benjamin's recusal decision. Pet. Br. 27-30. Petitioners' *amici* likewise suggest factors for the Court's consideration—but not necessarily the *same* factors. The ABA presses a *four*-factor inquiry. ABA Br. 19-20. The Center for Political Accountability urges the Court to focus on *six* factors. CPA Br. 18-19. The Conference of Chief Justices has a *seven*-factor test in mind. CCJ Br. 25-29. Public Citizen lists *ten* factors. PC Br. 15. And as a capper, the *amici* hasten to emphasize that their proposed factors should be deemed non-exclusive. *See* ABA Br. 19, CCJ Br. 25.

All of which results, of course, in an adjective-laden smorgasbord of relevant-but-not-decisive factors that as a matter of federal constitutional law may—or may not—require recusal in any given case. Those factors, as best we can summarize them, are as follows:

- Whether the "sheer volume" of support is "truly staggering" (Pet. Br. 28), "unusually large" (ABA Br. 19), "lopsidedly large" (American Academy Br. 3), "disproportionately large" (Committee for

Economic Development Br. 5), "outsized" (American Association for Justice ("AAJ") Br. 11), or even "extremely extraordinary" (CCJ Br. 5)—factoring in, of course, "the costs of judicial campaigns in a jurisdiction, recognizing that they vary with the size of the electorate and ... whether the election is contested, has a large or small field, or is long in duration, and ... whether public or alternative funding sources are available" (ABA Br. 19), as well as the "standard practice" in the area (CCJ Br. 26).

- Whether the support in question represented a "large" percentage of the candidate's total or only a "small fraction." Pet. Br. 26, 28-29.

- Whether the support was "within the scope of legislated limits" or, instead, "greatly exceed[ed]" those limits (AAJ Br. 2, 14)—keeping in mind that, although ordinarily "a contribution that complied with a contribution limit set by statute or rule would not violate due process," it may require recusal if the circumstances are such as would raise "obvious concerns" (CCJ Br. 26 n.48).

- Whether the support was provided by "the parties, the lawyers [or] amici" (PC Br. 15) or by some other "interested observer" (ABA Br. 20) with a "substantial stake" in the proceedings (CCJ Br. 4).

- Whether, when support is offered by a non-party, the "relationship between the supporter and the party to the case" is sufficiently "close[.]" CCJ Br. 29.

- Whether the support was directed "to the candidate or a political committee, and if the latter, whether the committee supported many candidates or, as here, was devoted solely to defeating one candidate (and hence electing the other)." PC Br. 15.

- Whether the support was "effective[]" (CCJ Br. 28) or played a "meaningful role" in the judge's selection (Pet. Br. 35).

- Whether the support was strictly independent and, if not, the extent to which the candidate exercised control over the support. CCJ Br. 26-27.

- Whether an expenditure was coupled with other forms of support, such as "campaign[ing], "solicit[ing] donations," and writing letters. Pet. Br. 29.

- Whether any advertising support "expressly refer[red] to the judge or the judge's opponent." CPA Br. 19.

- Whether similar support was offered "by people with interests on both sides of the litigation (or by the same person to all candidates) or just one." PC Br. 15.

- Whether the "supporter's record of campaign activity" shows that he "has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past." CCJ Br. 28.

- Whether the timing of the support "strongly suggests" that it was "intended to influence the outcome" of the litigation. Pet. Br. 29.

- Whether the judge's recusal decision was reviewable by his colleagues and, if so, whether they expressed "discomfort." Pet. Br. 29-30.

- Whether the election or appointment was contested (CPA Br. 19) and, if so, whether the contest was "competitive" (PC Br. 15) and, if so, whether the judge was selected by a "narrow ... margin" (Pet. Br. 30).

- Whether the "history between the supporter and the judge" raises "pertinent concerns about the probability or likelihood of judicial bias." CCJ Br. 28.

The "test" alone, such as it is, should alert the Court that something is amiss. Such scatter-shot *ad hocery* is not the stuff of which federal constitutional doctrine should be constructed. The point is not, of course, that there is no place in the law for fact-specific, contextual decisionmaking. Of course there is. The point is simply that in instances like this—involving all manner of case-dependent factors—it is simpler to police conduct through state statutes or rules rather than "through the Constitution" because a statute or rule can allow resolution of the issue to "turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater*, 532 U.S. at 352. And not just simpler, but more respectful of the State-to-State variations that underlie Our Federalism and the democratic process, as well.

B. Petitioners' Proposed Due-Process Rule Would Be Counterproductive In Practice.

Doctrinal purity aside, petitioners' "debt"-based due-process rule would create very real practical problems. There are three key points. First, petitioners' rule would spawn countless additional motions to disqualify judges—both state and federal, both elected and appointed—and thereby greatly increase the burden on the already-overburdened American court system. Second, simply by introducing the Constitution into the mix, and thus upping the ante significantly, petitioners' theory would likely cause judges to "over-recuse" on a grand scale. And finally, there is reason to suspect that petitioners' due-process test would lead to all sorts of mischief in the form of tactical maneuvers to force judges' disqualification.

1. Petitioners' rule would unduly burden the courts.

Reversal here will give birth to a new breed of litigation pleading: the "*Caperton* motion." *Caperton* practice can be expected to increase the burdens of litigation in a number of concrete ways.

a. First, and most obviously, by creating an entirely new—and vague—basis for recusal, petitioners' due-process rule will encourage the filing of additional disqualification motions. Once litigants are told that a judge's "debt of gratitude" may give rise to a "probability of bias," and thus to a federal constitutional duty to recuse, the *Caperton* motions will fly. As a snapshot indication of the scope of possible recusal litigation, consider that one study found that between 1995 and 1999, 63% of the Alabama Supreme Court's cases involved par-

ties or attorneys who had contributed to a winning supreme court candidate before their cases were decided.[7] In Michigan, the number was 89%.[8] Under petitioners' view, the opponents of every one of those litigants would be entitled to file a *Caperton* motion. (And, again, for reasons already explained, the filings would likely be at least as frequent, if not more so, in appointment systems, whether state or federal. *See supra* at 21-23.) Whether the motion would succeed, of course, would depend on the outcome of one of the several proposed multifactor balancing tests. But the Court should make no mistake, the motion would be filed.

b. Second, the burden would be exacerbated because, in deciding *Caperton* motions, reviewing judges would have to slog through a laundry list of contextual factors before determining whether, in fact, recusal was constitutionally required. *See supra* at 24-27. Whereas a State legislature, having considered the State's own specific history and circumstances, can peg the obligation to disqualify to a particular, easily-discernible fact—*e.g.*, a trial judge's receipt of a $2000 contribution, *see* Ala. Code §12-24-1, -2—the due-process inquiry, as petitioners and their *amici* concede, is not susceptible of bright-line resolution. *See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (lamenting tests that "jettison ... predictability for the

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[7] *See* Laura Stafford & Samantha Sanchez, *Campaign Contributions and the Alabama Supreme Court*, The Institute for Money in State Politics (May 5, 2003) *at* http://www.followthemoney.org/press/AL/20030505.pdf (visited Feb. 1, 2009)

[8] *See* Ronald D. Rotunda, *A Preliminary Empirical Inquiry Into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 No. 2 Prof. Law. 16, 18 (2003).

open-ended rough-and-tumble of factors, inviting complex argument in a [lower] court and a virtually inevitable appeal").

c. Third, *Caperton* practice would often require substantial discovery, thus bogging down the litigation process even further. Consider, again, the sorts of factors that petitioners and their *amici* have said should ultimately control the disposition of a *Caperton* motion: "the history between the supporter and the judge," the "relationship between the supporter and the party," and the "supporter's record of campaign activity," among others. In current practice, there is typically little, if any, discovery conducted in connection with disqualification motions made under state and federal recusal statutes and rules. *See* Flamm, *supra*, at 490, 911. But because, on petitioners' view, a *Caperton* motion would be the vehicle for exercising a fundamental *constitutional* right, the *Caperton* movant would presumably be entitled to discover at least some facts necessary to make out his claim.

d. Fourth, petitioners' sweeping due-process theory would require courts—including this Court—to radically curtail the practice of permitting single judges to make their own recusal determinations. Petitioners have emphasized, as an indication that Justice Benjamin's nonrecusal here violated the Due Process Clause, the fact that his "decision to participate in Massey's appeal was not subject to review by the other members of his court." Pet. Br. 30. But at least under current practice, that is typically the case. Recusal motions directed to a judge under 28 U.S.C. §455 are ordinarily decided by that judge in chambers, not by his court sitting en banc. *See Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980)

(Rehnquist, J.) ("[G]enerally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer."); Flamm, *supra*, at 501-02, 910-12 (summarizing state-court practice). But because the point of a *Caperton* motion would be to show (by way of a mushy balancing analysis rather than, say, a simple pecuniary-interest determination) that a judge is *constitutionally* untrustworthy to decide the merits of the movant's case, the solo in-chambers procedure likely would not suffice. Rather, as with other rights "established and ordained by the Constitution," there would presumably need to be some sort of "independent review" of the recusal determination. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505, 511 (1984) (First Amendment); *accord, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (Fourth Amendment); *Thompson v. Keohane*, 516 U.S. 99, 115-16 (1995) (Fifth Amendment).

e. Fifth, this Court, in particular, should note that if it were to adopt petitioners' position, it would have to wrangle with the unwieldy "debt of gratitude" test itself. Because this Court would be the only venue for review of motions (like the ones filed here) to recuse justices of a State's highest court, any *ad hoc* balancing rule would unleash a flood of "repeated petitions asking this Court to assess the due process implications of contributions in case after case" (PC Br. 1), and therefore commit this Court to correcting "misapplication[s] of a properly stated rule of law"—a task to which it is not well-suited. *See* S. Ct. Rule 10. Worse, every state-court disqualification motion that would (in the pre-*Caperton* days) have been based on state statutes, ethics codes, or court rules would, post-*Caperton*, simply be recast in due-process terms—thus raising a federal question and, under 28

U.S.C. §1257, making this Court the ultimate arbiter of efforts to disqualify state judges at any level.

f. Finally, reversal here would likely spawn additional collateral recusal-based litigation, as well. Most troublingly from the States' perspective, should petitioners prevail here, it would presumably be only a matter of time before constitutional "*Caperton* claims" arrived on the habeas-corpus scene. *See* 28 U.S.C. §2254(a) (habeas-corpus remedy available to individuals "in custody in violation of the Constitution ... of the United States"). Already, States have had to defend against habeas petitioners' assertions that a state judge's participation gave rise to an impermissible "appearance of bias" that required recusal. *See, e.g.*, *Davis v. Jones*, 506 F.3d 1325, 1331-36 (11th Cir. 2007); *Crater v. Galaza*, 491 F.3d 1119, 1130-33 (9th Cir. 2007); *Johnson v. Carroll*, 369 F.3d 253, 260-63 (3d Cir. 2004). Having prevailed in the majority of those cases on the ground that the Due Process Clause does not require (let alone clearly require) recusal for an alleged "appearance of bias," the States would now—following a reversal—be subjected to a second round of challenges predicated on petitioners' "probability-of-bias" criterion.[9]

g. Efforts to shrug off these systemic concerns are unpersuasive. Petitioners, for instance, assert that it is only in "exceptional cases where recusal is constitutionally required" and, therefore, where the burdens we have described would arise. Pet. Br. 36. The Council of Chief

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[9] Collateral attacks via 42 U.S.C. § 1983 are likewise not out of the question. *See Shepherdson v. Nigro*, 5 F.Supp.2d 305 (E.D. Pa. 1998) (suit against state-court judge alleging that his failure to recuse from a campaign supporter's case gave rise to a federal constitutional claim).

Justices likewise asserts that *Caperton* motions would be "limited to cases of extraordinary support." CCJ Br. 23. But adjectives like "exceptional" and "extraordinary" (even "extremely extraordinary," *id.* at 5) provide little concrete protection. Every litigant believes—and will argue, citing to a host of contextual considerations—that his case *is* "exceptional" or "extraordinary." The problem is that so many of the considerations that petitioners and their *amici* have proposed as relevant to the due-process inquiry ("exceptionalism" and "extraordinariness" among them) are vague, case-dependent, and relative. There simply is no way to decree, as an *a priori* matter, that a particular case is *not* "exceptional" or "extraordinary." The matter will always be open to debate. It would be far less burdensome to allow individual States—where appropriate in the light of their own histories and circumstances—to open the door legislatively by articulating clear standards to govern the necessity of recusal in particular instances.

Nor is it any answer to say that a "debt"-and-"probability"-based constitutional standard would entail no additional burdens because the same sorts of considerations that petitioners would locate in the Due Process Clause currently inform recusal decisions made under state statutes and court rules. First, it is a simple fact of litigation life that the advent of additional claims (or here, bases for disqualification) will yield additional court filings. Put simply, petitioners would give litigants seeking to disqualify judges an additional arrow for their quiver. Particularly given that the arrow is a constitutional claim—and an amorphous one at that—there is every reason to believe that litigants would use it. Second, the due-process claim that petitioners envision is different in an important respect—namely, its perma-

nence—from the state-law arguments that now control most recusal decisions. If a State's recusal standard turns out to be too stringent or too lenient, it can easily be tweaked (or repealed, if need be) through a statutory amendment or the promulgation of a new rule. If, by contrast, experience shows petitioners' proposed *constitutional* standard to be improvident, a fix will be far more difficult to implement. Finally, anyone defending against the burdens inherent in a new constitutional recusal standard on the ground that the due-process rule merely duplicates the analysis that prevails under existing state statutes needs to answer another—and more fundamental—question: What, then, is the point of minting a new constitutional rule?

2. Petitioners' rule would cause judges to over-recuse.

Systemic burdens and inefficiencies aside, there is reason to believe that petitioners' ill-defined due-process standard would cause judges to over-recuse. Even as matters stand now, judges facing disqualification motions confront a certain psychological pressure to recuse; no judge takes lightly the accusation that he or she may appear to be partial or corruptible. *See Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 929 (2004) (Scalia, J.) ("If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case."). Introducing the Constitution into the mix would raise the stakes considerably. The very point of petitioners' position, of course, is that a judge, by virtue of some purported "debt of gratitude," violates the Constitution—the nation's founding charter—simply by virtue of his or her presence on the

bench. It is difficult to imagine a more serious charge. *Cf.* U.S. Const. art. VI, § 3 (oath).

It seems scarcely debatable that if faced with likely accusations of oath-breaking for every supposed "debt," no matter how ill-defined, judges would defensively recuse even in instances where recusal is not necessary. The chilling effect could be very real. It would also be particularly pernicious in view of the fact that judges are not permitted the luxury of peace-of-mind recusals. Rather, they "ha[ve] a duty to sit where not disqualified which is equally as strong as the duty not to sit where disqualified." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J.); *accord, e.g.*, W. Va. Code of Jud. Conduct, Canon 3B(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.").

3. Petitioners' rule would encourage mischief and manipulation.

If the Court is concerned about the public perception of the judiciary, petitioners' "debt"-based recusal standard is a particularly bad solution. Unfortunately, litigants increasingly abuse the recusal procedure; they use disqualification motions—including those based on campaign support—as tools to shape the court that will decide their disputes. *See, e.g., Storms v. Action Wisconsin Inc.*, 754 N.W.2d 480, 487 (Wis. 2008) (motion to disqualify judge based on campaign support filed after decision rendered); *Ainsworth v. Combined Ins. Co. of Am.*, 774 P.2d 1003, 1014 (Nev. 1989) (same); *cf. Cheney*, 541 U.S. at 916 (Scalia, J.) ("The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it

has been cast for the other side, or because it has not been cast at all.").

Acknowledging this problem, Justice Breyer has observed that the recusal standard must be drawn so as to "prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989). Far from helping to remedy the abuse, petitioners' infinitely malleable due-process rule—based on vaguely defined "debt[s] of gratitude"—would only facilitate it. Machiavellian litigants would (should the stakes get high enough) have every incentive to exploit the test's vagueness by cobbling together a story about a judge's "indebtedness" to some interested party. More creatively still, litigants might go so far as to attempt to jigger court assignments by giving support to judges they perceive to be *unfavorable*. *See Adair v. Michigan Dep't of Ed.*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.) ("[I]t would be a simple expedient for a party or a lawyer to 'mold' the court that will hear his or her cases by tailoring contributions and opposition contributions.").

Individual cases aside, these manipulations would adversely affect the judicial system as a whole. As we have explained, the merits (or demerits) of the abusive disqualification motion would not always control the targeted judge's recusal decision; oftentimes, the *in terrorem* effect of being labeled an oath-breaker would cause the judge to step aside unnecessarily. *See supra* at 34-35. By contrast, should the judge stay on the case, the charges of unconstitutional conduct would only diminish public confidence in the judiciary.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Marc James Ayers
Andrew L. Brasher
Michael B. Duffy
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Counsel for *Amici Curiae*

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORP., AND SOVEREIGN COAL SALES, INC.,

Petitioners,

V.

A.T. MASSEY COAL CO., INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

LES WEISBROD
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW
Suite 200
Washington, DC 20001
(202) 965-3500
President, American Association for Justice

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, NW
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

**Counsel of Record*

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INTEREST OF *AMICI CURIAE*[1]

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of amicus briefs.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to its members and to the public interest. AAJ members litigate matters on behalf of their clients, often in state courts, some of which have elective judiciaries. Some AAJ members participate in those elections by making financial contributions to judicial candidates.

SUMMARY OF ARGUMENT

This case presents a series of knotty problems involving clashing doctrines of uncertain application to the Question Presented. Due process guarantees all litigants a fair and impartial tribunal. Because public perception plays such an important role in the continuing legitimacy of the Judicial Branch, both the reality and the appearance of bias in favor of or against a party can threaten the ability of the courts to dispense justice while adhering to the rule of law.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

At the same time, the vast majority of states have chosen to fill judicial offices through some form of election. That exercise of popular sovereignty necessarily imposes a need to raise campaign funds and brings with it at least the theoretical possibility of bias in favor of financial supporters. The natural sources of funding in these races are those who have a heightened knowledge of the courts, the judges, and the would-be judges—in other words, those who appear before these tribunals with some frequency: lawyers and frequent litigants. Their participation in these elections ought not be condemned. It is the discharge of a high civic duty. Nor should the judges they support normally be rendered ineligible to preside over or participate in decisions affecting those parties or those legal representatives. No due process violation occurs from the participation in judicial elections within the scope of legislated limits on financial support. In fact, in today's contentious judicial elections, where fact is often supplanted by wild accusations, there may well be a duty on the part of members of the bar to rally to the support of the courts and a truthful electoral record.

The balance, however, tips decisively in favor of a due-process requirement of recusal when great financial resources, well beyond the scope of legislated limits, are contributed by those involved in a pending matter that the candidate may be called upon to decide if elected. It should not matter whether that largess comes in the form of an outsized direct campaign contribution or an enormous independent expenditure designed to promote the candidate's election. Both can pose the same danger that the public would perceive that justice will be skewed in favor of the judge's

unusually significant political patron. It also should not matter if the financial support comes in the form of so-called issue advocacy. That type of political speech, which typically urges constituents to tell the officeholder how to vote on some pending matter, has no place in our system of justice. Unlike decisions in the political branches which are designed to be responsive to ebbs and flows of public sentiment, judicial determinations are not guided by the results of a popularity contest but by the application of the rule of law to facts in the record.

This is an unusual case. It does not involve electoral participation within the normal spectrum of financial support. Contributions within those normal limits, do not warrant recusal. However, the record in this case makes plain that the exorbitant financial efforts to influence the election of a judge who would inevitably sit on the appeal of the principal's pending litigation required that judge's recusal as a matter of due process.

ARGUMENT

I. DUE PROCESS REQUIRES A FAIR AND IMPARTIAL TRIBUNAL

This case presents a series of knotty problems involving clashing doctrines of uncertain application to the Question Presented. It is beyond peradventure that public respect and confidence in the judiciary is critically important to its place and function in our society. *See United States v. Mistretta*, 488 U.S. 361, 407 (1989){ TA \l "*United States v. Mistretta*, 488 U.S. 361 (1989)" \s "Mistretta" \c 1 } ("The legitimacy of the Judicial Branch ultimately depends on its reputation

for impartiality and nonpartisanship."). Without public confidence that disputes will be fairly adjudicated, there can be no system of justice. For that reason, as Justice Kennedy has observed, judicial integrity constitutes "a state interest of the highest order." *Republican Party of Minn. v. White,* 536 U.S. 765, 793 (2002){ TA \l "*Republican Party of Minnesota v. White,* 536 U.S. 765 (2002)" \s "White" \c 1 } (Kennedy, J., concurring). At a minimum, as this Court has repeatedly held, Due Process, assures an impartial tribunal dedicated to applying the law the same way to one set of litigants as it would be applied in similar matters involving other litigants. *See, e.g., id.* at 776.

II. WITHIN THE SPECTRUM OF CUSTOMARY PARTICIPATION, FINANCIAL SUPPORT OF JUDICIAL CANDIDATES POSES NO DUE PROCESS ISSUE MERITING RECUSAL

An elective judiciary, as found in the vast majority of the states, poses unique challenges to that guarantee, even as it embodies the ideal of self-determination. The widespread adoption of judicial elections grew out of the Jacksonian democracy movement, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law,* 62 U. CHI. L. REV. 689, 716 (1995){ TA \l "Croley, Steven P., *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995)" \s "Croley" \c 3 }. Indeed, the distrust Americans had of a judiciary too responsive to the appointive power has even deeper roots that were expressed in the Declaration of Independence. Dec. of Ind.{ TA \l "Dec. of Ind." \s "Dec. of Ind." \c 3 } ¶ 11

(""[The King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

Where judges are subject to election, both incumbents and challengers must undertake political campaigns, which, in recent years, have metastasized from comparatively docile and low-budget obligations to something far "nastier, noisier, and costlier." Roy A. Schotland, *Comment: Judicial Independence and Accountability,* 61 LAW & CONTEMP. PROBS. 149, 150 (1998){ TA \l "Schotland, Roy A., *Comment: Judicial Independence and Accountability,* 61 LAW & CONTEMP. PROBS. 149 (1998)" \s "Schotland" \c 3 }. Some judicial elections have become brutally contentious and grossly expensive undertakings. *See generally* Justice at Stake Campaign, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000-2008 (Jesse Rutledge ed. 2008){ TA \l "Justice at Stake Campaign, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000-2008 (Jesse Rutledge ed. 2008)" \s "Justice at Stake Campaign" \c 3 }, http://www.justiceatstake. org/node/14.

Necessarily, today's campaigns place a heavy premium on raising campaign funds. It is only natural that those contributions will come from the people most familiar with the workings of the courts and the performance of the candidates: lawyers and frequent litigants. No judicial candidate can realistically hope to raise significant funds for a campaign outside the legal profession. In fact, members of the legal profession may well have an *obligation* to participate in some of these campaigns in order to preserve the integrity of the courts. For

example, a notorious retention campaign took place in Tennessee in 1996. State supreme court justice Penny White was blindsided by a virulent, eleventh-hour campaign against her retention that falsely gave voters the impression that she had singlehandedly ordered the release of a rapist who then repeatedly stabbed his 78-year-old victim. The reality was that Justice White was merely a member of a supreme court, unanimous in its opinion that error required the resentencing of the defendant, just as the unanimous court of appeals decision below did. *See* John Gibeaut, *Taking Aim*, 82 ABA J. 50 (Nov. 1996){ TA \l "Gibeaut, John, *Taking Aim*, 82 ABA J. 50 (Nov. 1996)" \s "Gibeaut" \c 3 }. Justice White's subsequent defeat at the polls was widely taken as a defeat for judicial independence—and the distorted accusations should have merited a response from the organized bar. Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999){ TA \l "Reid, Traciel V., *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999)" \s "Reid" \c 3 }; Jerome J. Shestack, *President's Message: The Risks to Judicial Independence*, 84 ABA J. 8 (Jun. 1998){ TA \l "Shestack, Jerome J., *President's Message: The Risks to Judicial Independence*, 84 ABA J. 8 (Jun. 1998)" \s "Shestack" \c 3 }.

Similarly, members of the organized bar were the only likely financiers of the campaign against a South Dakota initiative last year that proposed the convening of citizen grand juries to review the performance of judges. Those whose decisions did not gain the approval of the citizen volunteers could be

subjected to civil liability and criminal conviction. It was the work of the bar, according to the proponents of the initiative that turned polls favoring the initiative by a three-to-one margin into a final vote of 90 percent against, ten percent in favor. *See* SD-Jail4Judges, http://www.sd-jail4judges.org. The financial participation of members of the bar was critically important to repelling this misguided effort.

As long as states continue to select or retain their judges by privately financed elections, lawyers and others concerned with the courts will—and should—participate actively and monetarily in these elections. Doing so fulfills a high civic duty anticipated by the First Amendment's free-speech guarantee. *Cf. Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971){ TA \l "*Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)" \s "Monitor Patriot" \c 1 } (the First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office"). It would be the height of folly in a system that cherishes popular sovereignty to bar or impair the professional standing of those most familiar with judicial officeholders because of their willingness to participate fully in public campaigns for judgeships. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978){ TA \l "*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)" \s "Bellotti" \c 1 } (citation and internal quotation marks omitted) ("freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

Under normal circumstances, that participation should not entail adverse consequences, neither disqualifying the contributing lawyers from representing clients before the tribunal over which the judge they favored presides nor requiring recusal of that judge. In this respect, "normal circumstances" means those activities such as campaigning for a candidate, serving on a campaign finance committee to encourage others to support the candidate of their choice, or providing financial support that is well within state campaign contribution limits. These types of participation within the normal spectrum of customary participation ought not engender a slew of recusal motions.

III. OUTSIZED CONTRIBUTIONS, EVEN IN THE FORM OF INDEPENDENT EXPENDITURES OR ISSUE ADVOCACY TRENCH UPON LITIGANTS' DUE PROCESS RIGHTS

Despite the propriety of the usual type of financial participation in elections, one cannot turn a blind eye to the potential danger that "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups." *White{ TA \s "White" }*, 536 U.S. at 790 (O'Connor, J., concurring). The challenge, however, is how to permit those most knowledgeable about judges and the legal system to participate fully in the judicial selection/retention process, while providing both litigants and the public with the assurance that cases will be fairly judged regardless of the identities of the judge's political patrons.

Under the facts of this case, the answer is yet more complicated. Mr. Blankenship, chair, CEO, and president of Respondent A.T. Massey Coal Co., and the principal in the dispute between the parties, did not contribute $3 million directly to the campaign of Justice Benjamin. Instead, Mr. Blankenship's direct contribution was $1,000, as permitted by West Virginia's campaign contribution limit. If that was as far as the controversy went, there would be no issue that warranted this Court's attention. Instead, the bulk of his financial participation in the election, which generated the controversy, was made in independent expenditures or to an organization he helped found to influence the outcome of the election through a thinly veiled form of "issue advocacy."[2]

Mr. Blankenship spent more than a half million dollars in independent expenditures on behalf of now-Justice Benjamin's candidacy. J.A. 186a. He also contributed nearly another $2.5 million to an organization, For the Sake of the Kids, he helped found to engage in similar electioneering against Justice Benjamin's opponent, though it qualified as a "527 organization" by framing its campaign as "issue advocacy." J.A. 150a.

In most elections, these types of expenditures are not subject to campaign finance regulation. Thus,

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[2] Petitioners also note that Blankenship put in considerable additional effort by recruiting additional financial contributors. Pet. Br. 29. *Amicus* does not find that type of First Amendment activity problematic in that it does not suggest a colorable means of engendering the type of indebtedness that might lead to accusations of impropriety.

this Court has recognized that independent expenditures are one of the fullest forms of citizen political expression. *See Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976){ TA \l "*Buckley v. Valeo*, 424 U.S. 1 (1976)" \s "Buckley" \c 1 }. At the same time, this Court has questioned the efficacy of such personally mounted campaigns:

> [I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may well prove counterproductive. The absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate."

Id.{ TA \s "Buckley" }. at 47.

Despite that supposition, those who engage in independent expenditures and issue advocacy of the type at issue here persist in their belief that the efforts make a critical difference and appear to have influenced the outcome of the McGraw-Benjamin election that is at the heart of this controversy.

Similarly, issue advocacy constitutes a pure form of First Amendment activity. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966){ TA \l "*Mills v. Alabama*, 384 U.S. 214 (1966)" \s "Mills" \c 1 } ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

When does that participation overstep reasonable bounds and implicate the due-process rights of litigants to an impartial tribunal? The answer appears to lie in an adaptation of the principles that undergird this Court's campaign

finance jurisprudence. In those cases, this Court found that "preventing corruption *or the appearance of corruption*" to be the only "legitimate and compelling government interest[]" sufficient to justify restricting campaign contributions. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985){ TA \l "*Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985)" \s "FEC v. National Conservative" \c 1 } (emphasis added). The danger of quid pro quo corruption between a contributor and a candidate exists only when decidedly "large contributions" are at issue. *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297 (1981){ TA \l "*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981)" \s "Berkeley" \c 1 }.

Amicus submits that similar compelling interests weigh in favor of recusal when the danger of quid pro quo bias between an outsized contributor and a judicial candidate are at issue. That these contributions are made through independent expenditures or issue advocacy should not demand a different analysis in the specialized context of judicial elections. As the Chief Justice observed, "in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.'" *FEC v. Wisc. Right to Life, Inc.*, 127 S.Ct. 2652, 2672 (2007){ TA \l "*Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007)" \s "FEC v. Wisc. Right" \c 1 } (opinion of Roberts, C.J.) (quoting *Buckley*{ *TA \s "Buckley"* }, 424 U.S. at 45.

One of those circumstances must be judicial elections that take place while the progenitor of that independent campaign has a pending matter that is likely to reach the judge whose election hangs in the balance. The situation is easily distinguishable from elections involving candidates for office in the political branches of government. Independent expenditures made to support a legislative candidate are different because the work of legislators is supposed to represent the views of their constituents, expressed, among other ways, by financial support of campaigns. The Judicial Branch, however, is not one of the "political branches" intended to be responsive to popular opinion but instead the custodian of the rule of law. It is supposed to be shielded from majoritarian views. When the judiciary appears too responsive to popular sentiment, it is loosed from the moorings of fairness and impartiality with a resultant loss of public confidence. For that compelling reason, judicial elections must be held to a different standard.

That different standard also suggests that no distinction should be drawn between express advocacy and issue advocacy. This Court has "assume[d]" that interests sufficient to "justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 206, n.88 (2003){ TA \l "*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)" \s "McConnell" \c 1 }. In judicial elections, there can be no genuine issue ads that are not tied to express election advocacy. The distinction between judicial and other offices is critical for evaluating this issue. It makes obvious sense, even in an election season, to permit advocacy

aimed at officeholders who are also candidates for legislative or executive office about some issue of public policy. The process of developing public policy is ongoing and may be especially and appropriately sensitive to public opinion during an election. It is illegitimate to engage in the same behavior to influence judicial decisionmaking. Thus, no proper purpose is served by urging citizens-voters to call Judge Jones and tell him to approve the conviction of a particular defendant or the liability of a company in a pending case the way that it is perfectly appropriate to use issue advocacy to urge those same citizen-voters to call Representative Smith and urge her to vote no on H.B. 25.

The fact that so-called issue ads mentioning the candidates' names are used solely to influence judicial elections is obvious. It is also a matter of record. For example, the U.S. Chamber of Commerce has boasted that its ads on judicial candidates are intended to serve that purpose. At a 2001 conference convened by the Chamber, the architect of their judicial election strategy played some of the issue ads (described as "public education efforts") used in the previous judicial election cycle. One condemned several actions by a judge seeking reelection and concluded with the tagline that she had "bad judgment for Indiana." Center for Legal Policy, Manhattan Institute, JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE (transcript of proceedings of April 18, 2001 conference) at 26-27. Another supported a candidate for the Mississippi Supreme Court for bringing "common sense" to that court. *Id.* at 27-28. The efforts helped twelve of fifteen candidates endorsed by the Chamber win election and that result encouraged the Chamber to plan "a significant

expansion of our level of activity" in judicial elections. *Id.* at 28, 40 (remarks of James Wooten).

Amicus suggests a standard that would not restrict such advertising, even if the sponsor or sponsors might properly be subject to campaign disclosure laws. Nor should the standard open the floodgates to recusal motions for ordinary participation in judicial elections. However, when the contributions, including independent expenditures or contributions to "issue-advocacy efforts," greatly exceed legislated limits and the contributor has pending litigation likely to come before that judge, the potential for bias becomes palpable and recusal should follow.

Under the facts of the instant case, Mr. Blankenship's extraordinary financial efforts required recusal of Justice Benjamin as a matter of due process. The balance between clashing doctrines clearly tips in favor of recusal under these circumstances. Regardless of whether the bias is real or potential, the objective of a fair and impartial tribunal is sufficiently endangered to require the judge's non-participation as a matter of due process.

CONCLUSION

For the foregoing reasons, the decision below should be vacated, and the case remanded for further proceedings without Justice Benjamin's participation.

Respectfully submitted,

ROBERT S. PECK
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
777 6th Street, NW
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amicus AAJ

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

MASSEY COAL COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN

H. THOMAS WELLS, JR.
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000

Counsel for Amicus Curiae
American Bar Association

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INTEREST OF THE AMICUS[1]

Amicus curiae American Bar Association ("ABA") respectfully submits this brief in support of Petitioners and urges the Court to provide guidance concerning the requirements imposed by the Due Process Clause of the Fourteenth Amendment on a judicial recusal decision where a judge has received a substantial and proximate campaign contribution from a party in a case before the judge.

The ABA has been at the forefront in advancing legal and judicial ethics for over one hundred years. With approximately 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. ABA members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its membership includes lawyers in private practice, government service, corporate law departments, and public interest and other nonprofit organizations, as well as legislators, judges, law professors, law students, foreign lawyers and non-lawyer associates in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters or e-mails on file with the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor

One of the ABA's goals is "[t]o preserve the independence of the legal profession and the judiciary."[3] Since at least 1908, when the ABA adopted its first CANONS OF PROFESSIONAL ETHICS, the ABA has taken a leading policy-making role on issues involving judicial impartiality and disqualification, the ability of state courts to guarantee due process of law to all litigants, and the public's confidence in the integrity and impartiality of the judiciary. This work has been incorporated into the ABA's evolving Canons of judicial conduct which, as discussed below in the Argument section, have contained mandatory provisions since 1990 that would require recusal under the facts of this case.

In addition, the ABA has actively worked to promote public understanding of, and respect for, the judiciary through a variety of publications,[4] initiatives,[5] and programs.[6] Among others, the

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was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *at* http://www.abanet.org/about/goals.html.

[4] For example, the ABA Committee on Standards of Judicial Administration has promulgated a multi-volume set of suggested standards of judicial administration, including STANDARDS RELATING TO COURT ORGANIZATION (rev. 1990), STANDARDS RELATING TO TRIAL COURTS (rev. 1992), and STANDARDS RELATING TO APPELLATE COURTS (rev. 1994).

[5] For example, the ABA's Commission on the 21st Century Judiciary, and those initiatives undertaken by its Standing Committee on Federal Judicial Improvements and by its Standing Committee on Judicial Independence.

Judicial Disqualification Project inaugurated in 2007 by the ABA's Standing Committee on Judicial Independence has researched disqualification rules around the country. The forthcoming final report will include a discussion of concerns regarding judicial proceedings involving large campaign donors.

Through these and other projects, the ABA has devoted over one hundred years to addressing the issues raised in this case and, specifically, the effects of the appearance of judicial impropriety on public confidence in the judiciary.

SUMMARY OF ARGUMENT

The integrity of the judicial process requires that judges avoid both actual bias and the reasonable appearance of bias so as to preserve confidence in the fairness and impartiality of judicial determinations. Few actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor to the judge's election campaign. The principle of an unbiased judiciary has been reflected in the ABA's Canons since at least 1908. Along with the federal counterpart, 28 U.S.C. § 455(a), the Canons focus on disqualification for both actual impropriety and the reasonable appearance of impropriety.

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[6] For example, the ABA Coalition for Justice uses outreach programs to raise public awareness of, and confidence in, the judiciary and develops public/bar relationships with national organizations and federal agencies on justice system issues.

Yet recusal motions rarely succeed in state court cases where contributors appear as litigants, because judges typically self-enforce the governing disqualification standards. Where a judge's decision to remain on a case has been met with widespread public disagreement, the negative effects on the courts have been real and immediate, as shown by the present case. The ABA therefore suggests that this Court should identify those considerations that govern recusal on due process grounds when a contributor to the judge's election campaign is a party. Based on its research and the experiences of its members in this field, the ABA suggests some of the factors that it believes are relevant to this issue.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE INTEGRITY OF THE JUDICIAL SYSTEM IS THREATENED WHEN JUDGES FAIL TO RECUSE THEMSELVES FROM CASES BROUGHT BY OR AGAINST SUBSTANTIAL CAMPAIGN CONTRIBUTORS.

It has long been recognized that public confidence in the integrity of the judiciary is vital to our system of justice. Because courts possess "neither the purse nor the sword," *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), their authority depends ultimately on public acceptance of their legitimacy. That acceptance depends, in turn, on the public's faith in the impersonal and reasoned foundation of judicial decisions. *See, e.g., United States v. Mistretta*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends

on its reputation for impartiality and nonpartisanship."); Stephen Breyer, *Serving America's Best Interests,* DAEDALUS, Fall 2008, 139, 139 ("[T]he judiciary is, at least in some measure, dependent on the public's acceptance of its legitimacy").[7] Both litigants and government bodies depend upon courts remaining "free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind." *Oakley v. Aspinwall,* 3 N.Y. 547, 552 (1850).[8]

As the instant case reflects, few actions jeopardize the public's trust in the judicial process more than a judge's failure to recuse in a case

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[7] *See also* CODE OF PROFESSIONAL ETHICS Preamble (1908), ("In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed * * * and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration."), *at* http://www.abanet.org/cpr/1908-code.pdf. *See generally* HOWARD JAMES, CRISIS IN THE COURTS (1967); HERBERT JACOB, JUSTICE IN AMERICA (1972); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 588 (tent. ed. 1958).

[8] *See, e.g., Stern Bros., Inc. v. McClure,* 160 W. Va. 567, 577, 236 S.E.2d 222, 229 (1977) (citing this language with approval); *Forest Coal Co. v. Doolittle,* 54 W. Va. 210, 227, 46 S.E. 238 (1903) (same).

involving a substantial contributor to the judge's election campaign. Historically, state judicial elections were "low key affairs," in which the merits of special legal disputes were not discussed and advertising was modest. *See* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002). Recent years, however, have seen a marked increase in efforts by political donors to fund judicial elections that may benefit their agendas.[9] In 2008, spending on television advertising in state high court elections alone was up 24% over the figure for 2006 election campaigns. Much of the funding for these campaigns came from special interests seeking to achieve specific policy outcomes.[10]

Polling data demonstrates that large and concentrated contributions to judicial officers have a negative effect on public confidence in the integrity of the courts. Surveys conducted at national[11] and

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[9] As an Ohio AFL-CIO official candidly acknowledged: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." J. Christopher Heagarty, *The Changing Face of Judicial Elections*, 7 N.C. St. B. J. 20, 21 (Winter 2002).

[10] *See* Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness, *at* http://justiceatstake.org/node/63 (Nov. 5, 2008).

[11] Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Courts: Annenberg Public Policy Judicial Survey Results* (2007) (finding that 69% of the public "thinks that raising money for elections affects a judge's rulings to a moderate or great extent."), *at*

state[12] levels show that a substantial majority of the

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http://www.appcpenn.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf; Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007), (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions," and more than 80% of African-Americans express this view, including 51% believing that judicial election contributions carry a "great deal" of influence), *at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf.

[12] **Texas:** Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) (finding that 83% of Texans believe money has an impact on judicial decisions); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, 8 (2001) (finding Texas Supreme Court 750% more likely to grant discretionary petitions for review filed by contributors of at least $100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of $250,000 or more) *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm.

Pennsylvania: Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) (finding that 90% of voters believe judicial decisions were influenced by large campaign contributions); *see also* Sandra Day O'Connor, *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25 (noting that statistic).

Ohio: T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER (CLEVELAND), Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90% of respondents believed campaign contributions influenced judicial decisions). *See also*

public – reported to be as high as 90% in two states – believes that campaign contributions influence judicial decisions. Many state court judges hold the same view: A 2002 national survey of elected state judges showed that 26% of them believe that campaign contributions have at least *some* influence on judges' decisions, and another 9% believe such contributions have a *great deal* of influence.[13]

In short, the growing role of private money in judicial elections has been seen to have created a perception that, as this Court stated concerning campaigns for federal offices, "large donors call the tune." *Compare McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 143-44 (2003) (discussing importance of government interest in "combating the appearance or perception of corruption engendered by large campaign contributions [to candidates for federal offices]").

Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (finding that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs," and "voted in favor of contributors 70 percent of the time.")

[13] Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire*, 5 (2001-2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf

II. ABA STANDARDS MANDATING RECUSAL IN CASES INVOLVING THE REASONABLE APPEARANCE OF IMPROPRIETY OFTEN DEPEND ON SELF-ENFORCEMENT.

A. ABA Standards Mandate Recusal In Cases Presenting An Appearance of Impropriety In Reasonable Minds.

Since at least 1908, when the ABA adopted the first CANONS OF PROFESSIONAL ETHICS, the ABA has recognized the importance of a judiciary that will forego "other employments, whether of business, political or other character, which may embarrass their free and fair consideration of questions before them for decision."[14] In 1924, Canon 4 of the ABA's first CANONS OF JUDICIAL ETHICS recognized that judicial conduct "should be free from impropriety and the appearance of impropriety."[15] In 1972, in the first reformulation of the Canons as the CODE OF JUDICIAL CONDUCT, this principle was stated more forcefully as Canon 2: "A judge should avoid impropriety and the appearance of impropriety in all his activities."[16]

When the Code was revised in 1990 and retitled the MODEL CODE OF JUDICIAL CONDUCT ("1990 MODEL

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[14] CANONS OF PROFESSIONAL ETHICS Canon 2 (1908), *at* http://www.abanet.org/cpr/1908-code.pdf.

[15] CANONS OF JUDICIAL ETHICS Canon 4 (1924), *at* http://www.abanet.org/cpr/jclr/1924-canons.pdf.

[16] CODE OF JUDICIAL CONDUCT Canon 2 (1972) *available from* ABA Archives.

CODE"), "should" was replaced by "shall" in Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[17] A test for the appearance of impartiality was also added to the 1990 MODEL CODE, which was "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[18] This mandate, accordingly, has been recognized since at least 1990.[19]

In 1997, Commentary was added to Canon 5 that specifically addressed judicial campaign fund-

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[17] MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990), *at* http://www.abanet.org/cpr/mcjc/canon-2.html. According to the Reporter's Notes, this change was not intended to effect a substantive change but rather, to "more accurately indicate the nature of mandatory standards expressed in terms of 'should' in the 1972 Code." LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 12 (1992).

[18] 1990 MODEL CODE Canon 2 Commentary, *supra* note 17. According to the Reporter's Notes, this test was added "[b]ecause the danger caused by the appearance of impropriety consists in damaging public confidence in the judiciary." MILORD, *supra* note 17, at 13.

[19] West Virginia's current CODE OF JUDICIAL CONDUCT appears to be the same as the ABA's 1990 MODEL CODE as to Canon 2, Rule 2(A) ("A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), and as to the Commentary to Rule 2(A), which includes the same test for appearance of impropriety. W. VA. CODE OF JUDICIAL CONDUCT, *at* http://www.state.wv.us/wvsca/JIC/codejc.htm.

raising.[20] This resulted from "a survey of ethics opinions, judicial disqualification cases, and news articles from the general media" that convinced the ABA's Standing Committee on Ethics and Professional Responsibility that although permissible from a legal standpoint, "the fund-raising that accompanies judicial campaigns frequently gives rise to conflicts of interest that may reflect adversely upon the impartiality of the judiciary."[21] The added Commentary stated:

> There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. * * * Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for

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[20] MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1997 amendments), a*vailable from* ABA Archives. Canon 5 stated: "A judge or judicial candidate shall refrain from inappropriate political activity."

[21] Recommendation and Report 112 to the ABA House of Delegates from the Standing Committee on Ethics and Professional Responsibility, Standing Committee on Lawyers' Responsibility for Client Protection, and the Judicial Division, August 1997, at 1, *available from* ABA Archives.

disqualification as provided under Section 3(E).[22]

Most recently, in 2007, after a comprehensive review of the ABA standards, the MODEL CODE OF JUDICIAL CONDUCT (2007) ("2007 MODEL CODE") was adopted. Canons 1 and 2 were combined as Canon 1, which now states, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[23] The mandatory "shall" was retained and the drafters decided to place the "injunction to avoid impropriety and its appearance" in "the very first Canon."[24]

In addition, the test for the appearance of impropriety was amended and is now "whether the conduct would create in reasonable minds a

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[22] MODEL CODE OF JUDICIAL CONDUCT Canon 5 Commentary (1997 amendments), a*vailable from* ABA Archives. Canon 3 stated: "A judge shall perform the duties of judicial office impartially and diligently." *Id.* Canon 3(E) dealt with disqualification, of which 3(E)(1) stated, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [listing circumstances]." *Id.*

[23] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007), *at* http://www.abanet.org/judicialethics/ABA-MCJC-approved.pdf. Canon 2 now states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." *Id.*

[24] Recommendation and Report 200 to the ABA House of Delegates from the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, February 2007, at 5, *available from* ABA Archives.

perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[25]

The 2007 MODEL CODE thus continues to focus – as does its federal counterpart, 28 U.S.C. § 455(a)[26] -- on concern for both actual impropriety and the appearance of impropriety. Further, for both Canon 1 of the 2007 MODEL CODE and Section 455(a), the test is whether the judge's impartiality might reasonably be questioned.[27] The ABA's concern with the appearance of impropriety is based on its conclusion that "[a]ppearances matter because the public's perception of how the courts are performing

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[25] 2007 MODEL CODE Canon 1 Rule 1.2, cmt [5], *supra* note 23. Rule 1.2 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." *Id.*

[26] 28 U.S.C. § 455(a) provides that a judge "shall" disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." The objectivity of this standard, which was adapted from the 1972 version of the ABA's MODEL CODE, replaced an earlier statute that included the subjective phrase "in his opinion." The amended version, according to the report of the House Judiciary Committee, was designed to promote public confidence in the impartiality and integrity of the judicial process by making recusal mandatory if any reasonable factual basis for doubting the judge's impartiality exists. H.R. REP. NO. 93-1453 at 5, *reprinted in* 1974 U.S. C.C.A.N. 6351, 6354-55.

[27] *Compare* 28 U.S.C. § 455(a) *with* 2007 MODEL CODE, Canon 1, Rule 1.2, cmt [5], *supra* note 25.

affects the extent of its confidence in the judicial system." ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, 10 (2003).

Rule 2.11(A), which is the 2007 MODEL CODE's general disqualification rule,[28] has been adopted in some form in virtually every state.[29] In 1999, in

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[28] Rule 2.11(A) was formerly Canon 3E(1) in the 1990 MODEL CODE. Rule 2.11(A) states "A judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [listed circumstances (A) (1) – (A)(6)]".

[29] Rule 2.11(A)'s requirement of disqualification if a judge's impartiality might reasonably be questioned has been adopted in 45 states, and with variations in California, Mississippi and Wisconsin. *See* CAL. CIV. PROC. CODE § 170.1 (a)(6)(A) (West 2005) (requiring disqualification if the judge "believes there is a substantial doubt as to his or her capacity to be impartial" or if "a person aware of the facts might reasonably entertain a doubt" as to the judge's partiality); MISS. CODE OF JUDICIAL CONDUCT Canon 3E(1) (2007) (requiring disqualification when a judge's "impartiality might reasonably be questioned by a reasonable person knowing all the circumstances"); WIS. SUP. CT. RULE 60.04(4) (2007) (requiring disqualification when "well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial"). The remaining two states have adopted differing language. MONTANA CANONS OF JUDICIAL ETHICS Canon 13 (2007) (a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor"); MICH. COURT RULES § 2.003 (2007) ("a judge is disqualified when the judge cannot impartially hear a case"). As stated *supra* note 19, West Virginia's Code of Judicial Conduct includes the 1990 MODEL CODE's test for the appearance of impropriety, which is "whether the conduct would create in reasonable minds a perception that

recognition of the growing importance of campaign funding on judicial elections, the ABA added what is now Rule 2.11(A)(4), requiring disqualification when a judge has received campaign contributions above a certain level (which the state is free to establish for itself) from parties or lawyers involved in a case.[30] The Rule requires disqualification when:

> [t]he judge knows or learns by means of a timely motion that a party, a party's lawyer or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $ [insert amount] for an individual or $ [insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].[31]

At least two states have adopted Rule 2.11(A)(4),[32] and this rule was reaffirmed by the ABA House of Delegates in 2007.

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the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

[30] Rule 2.11(A)(4) was originally added as Canon 3E(1)(e) in the 1999 amendments to the 1990 MODEL CODE, based on the work of the ABA Ad Hoc Committee on Judicial Campaign Finance.

[31] Where specific dollar amounts are not used, the "reasonable and appropriate" language should be used. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2004) at 245.

[32] Alabama and Mississippi have adopted versions of Rule 2.11(A)(4). *See* ALA. CODE §§ 12-24-1, 2 (incorporating specific dollar amount); MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2)

B. Disqualification Standards Usually Depend on a Judge's Self-Enforcement.

The 2007 MODEL CODE – like its federal counterpart, 28 U.S.C. § 455(a) – requires disqualification for both actual impropriety and the appearance of impropriety. Since disqualification motions are usually addressed to the judge in question, however, the standard often goes unenforced, especially in cases involving the appearance of impropriety.

If a challenge presents a reasonable basis for doubt about the judge's personal stake or interest in the outcome, then the judge should grant the recusal motion. If the judge does not do so, at least at the trial or intermediate court level, factual issues relating to the motion may be determined by another judge, or possibly by an appellate court. When the judge sits on a state's highest court, of course, no appeal based on state law issues exists.

The reality is that recusal motions have "repeatedly been rejected by appellate courts in a number of states where judges are elected." RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 9.44 (2d ed. 2007) (collecting cases). When they involve issues related to campaign financing, such motions "hardly ever succeed." John Copeland Nagle, *The Recusal*

(incorporating reasonable and appropriate rather than a specific dollar amount).

Alternative to Campaign Finance Legislation, 37 HARV. J. ON LEGIS. 69, 87 (2003).

There are many possible explanations for these results. Judges take an oath to be impartial and may honestly believe that they can decide the case fairly, regardless of the source of campaign contributions. They may be concerned that disqualifying themselves could be interpreted as validating public suspicion that elected judges are beholden to their contributors. Indeed, one reason for not forbidding a judge from hearing matters in which a litigant has contributed to the judge's campaign is to prevent unscrupulous parties or counsel from making contributions to, and thereby disqualifying, judges whose views on the law may be unsympathetic to their own.[33]

The appearance of impropriety, however, is not dispelled by a judge's belief in his or her impartiality,

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[33] On the other hand, requiring recusal based on campaign contributions could make campaign fundraising more difficult. Accordingly, the ABA does not assert that recusal is required in the face of *any* campaign contribution by a party or lawyer appearing before the recipient judge. Many elected judges, particularly those in more remote areas, still rely on relatively small, individual contributions from the local bar, and the MODEL CODE has long had a *de minimis* exception with respect to disqualification for economic interests in Rule 2.11(A)(3) and in the Terminology section definition of "*de minimis*" as "an insignificant interest that could not raise a question regarding the judge's impartiality." Furthermore, an absolute bar on such contributions would be counterproductive, for it would likely prevent the judge from hearing virtually any case in that jurisdiction, and would likely raise significant First Amendment concerns as well.

no matter how legitimate. Where a judge's decision to remain on a case has been met with widespread public disagreement, the negative effects on the courts have been real and immediate, as demonstrated by the many press accounts of the instant case, as well as those in Alabama, Florida, Illinois, Kansas, Nevada, Ohio, Texas, and Wisconsin.[34]

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[34] *E.g.*, Mike Linn, *Group Wants Cobb Off Case*, MONTGOMERY ADVERTISER, Jan. 24, 2007 (reporting claim that Alabama Chief Justice "is not fit in this case to dispense justice" because she accepted contributions from a lawyer in the case); Elaine Silvestrini, *Public Thinks Campaign Cash Sways Judges*, TAMPA TRIBUNE, Nov. 4, 2006 (reporting on judicial campaign contributions from lawyers and public perception that these influence judges); Editorial, *Illinois Judges: Buying Justice?*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8 (discussing insurance company's campaign contribution to Illinois Supreme Court Justice who later voted to overturn $1 billion damage verdict against the insurer); Editorial, *Politics, Justice*, LAWRENCE JOURNAL-WORLD, Mar. 29, 2007 (discussing appearance problem where judge dismissed criminal charges against an abortionist after accepting campaign contributions from the defense lawyers); Michael J. Goodman & William C. Rempel, *Justice v. Justice*, L.A. TIMES, June 8, 2006, at A1 (reporting on Nevada judges who "routinely rule in cases involving friends, former clients and business associates," and in favor of lawyers who "fill their campaign coffers"); Liptak & Roberts, *supra* note 12; Dee Hall, *Can Our Elected Judges Be Neutral? Campaign Contributions from Special Interest Groups Can Create an "Appearance of Conflict of Interest" Some Say*, WIS. ST. J., April 9, 2007, at A1 (reporting on revelation that pro-school-choice group had campaigned aggressively to elect justice who cast deciding vote upholding constitutionality of school voucher plan).

III. THIS COURT SHOULD IDENTIFY THE DUE PROCESS CONSIDERATIONS THAT GOVERN RECUSAL WHEN A CONTRIBUTOR IS A PARTY.

The ABA believes that guidance is needed from the Court as to the due process considerations that should be made by a judge in determining whether recusal is constitutionally required when a campaign contributor is a party to a case before that judge.

The ABA does not presume to suggest hard and fast rules for determining when the failure to recuse constitutes a due process violation. However, based on its research and the experiences of its members in this field, the ABA has developed factors that it believes are relevant in campaign contribution cases. These include the size and importance of the contribution since, as the amount increases, so does the perception of influence and the risk that the judge's impartiality might be reasonably questioned. A contribution that is unusually large in absolute or relative terms, or that results in an appearance of dependence on the contributor, should weigh heavily in favor of recusal. However, an appropriate dollar limit may depend on the costs of judicial campaigns in a jurisdiction, recognizing that they vary with the size of the electorate and with whether the election is contested, has a large or small field, or is long in duration, and with whether public or alternative funding sources are available.

The timing of the contribution should also be considered. When a case was pending at the time the contribution was made or in relative proximity to

that time, a perception that the contribution was made to influence the judicial decision is more likely.

Finally, the relationship between the contributor and the case is of paramount importance. A contribution from a party will inevitably give rise to a greater appearance of impropriety than a contribution from an interested observer.

As this Court stated, "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotations marks and citations omitted). The ABA suggests that, as in *Aetna*, the constitutional question here is not whether Justice Benjamin was actually biased, but only whether his refusal to recuse himself was a violation of Petitioners' due process rights: it is whether his participation in the case "would offer a possible temptation to the average * * * judge to * * * lead him not to hold the balance nice, clear and true." *Id.* at 822, quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (ellipses original to *Aetna*).

The magnitude and timing of the contributions to Justice Benjamin's campaign invite the Court to delineate the considerations that a judge should make in determining whether recusal is required by the Due Process Clause when a campaign contributor is a party in a case before the judge. This guidance is especially needed today, when increased judicial

campaign contributions pose a greater threat than ever to public confidence in the integrity of the judiciary.

CONCLUSION

The ABA urges the Court to provide guidance on the scope of the Due Process Clause's limits on a judge's authority to adjudicate matters in which he has received a substantial and proximate campaign contribution from a party, and to reverse and remand this matter for consideration consistent with that guidance.

Respectfully submitted,

OF COUNSEL:

KEITH R. FISHER
WILLIAM F. SHEEHAN

H. THOMAS WELLS, JR.
COUNSEL OF RECORD
PRESIDENT
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000
Counsel for Amicus Curiae
American Bar Association

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HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE CAMPAIGN LEGAL CENTER, AND THE REFORM INSTITUTE IN SUPPORT OF PETITIONERS

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW, Suite 650
Washington, DC 20036
(202) 736-2200

JAMES J. SAMPLE
Counsel of Record
AZIZ HUQ
J. ADAM SKAGGS
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Petitioners is filed on behalf of three nonprofit, nonpartisan organizations: The Brennan Center for Justice at New York University School of Law (the "Brennan Center"), The Campaign Legal Center, and The Reform Institute.

The Brennan Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through empirical research, counseling, and advocacy, the Brennan Center works to protect the judiciary from politicizing forces, including the undue influence of money. The Brennan Center favors neither judicial appointments nor judicial elections. Rather, it strives to promote fair courts regardless of selection mechanism.

The Campaign Legal Center, Inc. ("CLC") works in the areas of judicial integrity, campaign finance, voting rights, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's governmental ethics, campaign finance, and election laws are enforced.

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[1] The parties have consented to the filing of this brief. Petitioners and Respondents have each filed a letter of consent to all *amicus* briefs with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* contributed monetarily to the preparation or submission of this brief.

The Reform Institute brings together business leaders and policy experts, as well as retired and current elected officials, to work to restore integrity and effectiveness to our government and the electoral process. The Institute is a nonpartisan educational organization working to strengthen the foundations of our democracy and build a resilient society. The Institute formulates and advocates valuable, solutions-based reform in vital areas of public policy. Since its founding in 2001, the Institute has supported reforms that protect the integrity of the electoral process, promote a more informed electorate, encourage greater competition, empower citizens, reduce the influence of special interests, and ensure effective enforcement and administrative support.

Amici share the concern that the injection of massive sums of money into judicial campaigns by litigants and lawyers can, in extraordinary circumstances, threaten the integrity, impartiality, and independence of the courts, and thereby deprive the litigants appearing before those courts of due process of law. *Amici* therefore file this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

This case involves an egregious instance of a broader national trend: (1) a litigant faces a $50 million judgment in a business dispute between mining companies; (2) a sole individual, the litigant's

CEO, individually spends $3 million to help elect a judge; (3) the $3 million spent by the sole individual amounts to more than all other expenditures in support of that judge *combined*; (4) the judge, after his election, declines to recuse himself from the litigant's appeal; and (5) the same judge casts an outcome-determinative vote reversing the judgment against the litigant. These extraordinary facts warrant reversal as a manifest affront to due process.

While the facts of this case are egregious, the underlying question of due process is raised in an increasing number of cases nationally. The last decade has witnessed an explosion in campaign expenditures in judicial elections. Lawyers and litigants, unsurprisingly, are the principal sources of funds. Increasingly, as Justice Sandra Day O'Connor has observed, such contributions "threaten the integrity of judicial selection and compromise the public perception of judicial decisions." Sandra Day O'Connor, Op-Ed., *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25.

This Court should make clear that the Fourteenth Amendment's Due Process Clause compels recusal where, as in this case, the facts and circumstances create the overwhelming perception that objectively massive campaign expenditures can purchase a favorable outcome in a specific pending case. Such a decision would establish the need for state courts to tread with proper concern for constitutional values in

an area that has so far been characterized by doubt, uncertainty, and variable enforcement.

If the Court does not speak decisively in this bellwether case, which is being closely watched across the country, the message will be clear: Litigants, lawyers, and judges will understand that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases. A decision lacking an unequivocal statement that the facts of this case, taken together, fall beneath the floor of due process, will unfortunately – but inevitably – be interpreted as license by future actors in the shoes of Mr. Blankenship and Justice Benjamin. The resulting race to the bottom will severely corrode both the quality and perception of American justice. Conversely, reversal would convey to litigants, lawyers, and judges that disqualification standards – and their due process underpinnings – must be taken seriously. The Court would thereby thwart, or at least mitigate, a damaging national trend.

In 2002, Justice Kennedy made clear that states "may adopt recusal standards more rigorous than due process requires." *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring). Justice Kennedy thus appropriately invited states to consider measures aimed at due process *plus*. This case however, calls on this Court to reinforce the predicate implicit in Justice Kennedy's statement in *White*: that there is a floor of due process *simpliciter* – a point at which the facts are so egregious as to cross over "the outer boundaries" of judicial qualification

such that the Due Process Clause of the Fourteenth Amendment requires recusal. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

ARGUMENT

I. CHANGES IN THE FINANCING OF JUDICIAL ELECTION CAMPAIGNS HAVE CREATED NEW THREATS TO DUE PROCESS.

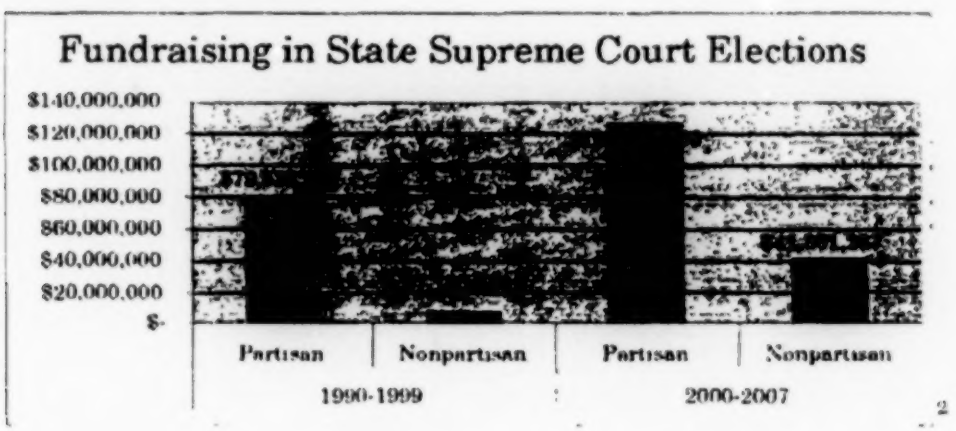
The mere fact that judges on state courts across the United States are elected does not, in and of itself, implicate due process concerns. But massive campaign expenditures by litigants and lawyers before the courts, combined with particularized circumstances such as those in this case, implicate fundamental fairness concerns. No litigant in the position of the Petitioners in this case could believe that they had received the *sine qua non* of due process: a fair hearing before an impartial arbiter.

The circumstances and sums of the expenditures by the Respondent's CEO constitute an egregious example of a troubling trend. Increasingly, litigants and lawyers, sometimes with specific pending cases before the bench, are spending extraordinary sums in judicial elections. In turn, variable enforcement of the general disqualification standard, as illustrated by Justice Benjamin, creates the appearance, and perhaps the reality, of bias. This case offers the Court a clean vehicle to mitigate the most pernicious effects of this worsening trend.

BEST AVAILABLE COPY

A. Judicial Election Expenditures Have Dramatically Increased In The Last Decade.

The trend towards expensive judicial campaigns began in the late 1990's. The sums raised by judicial candidates have escalated dramatically since then. Indeed, as the following graph indicates, state supreme court candidate fundraising in the 2000's through the year 2007 alone, dwarfs the totals for the entirety of the 1990's.



[2] The fundraising totals in the graph above are based on data from the National Institute on Money in State Politics. The data are available at www.followthemoney.org. For purposes of the figures illustrated above, the partisan category includes Alabama, Illinois, Louisiana, Michigan, North Carolina, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. The nonpartisan category includes Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Nevada, Oregon, Washington, and Wisconsin. Ohio and Michigan are categorized as partisan states, even though candidates are not identified by party on the ballots. In both states, candidates are identified with parties during the campaign season; in Michigan, parties nominate the candidates.

(Continued on following page)

In the 2005-06 election cycle, half of the states that held entirely privately-financed, contested supreme court elections (five of ten) broke state fundraising records; the median amount raised by supreme court candidates also leapt 20 percent from 2004. James Sample et al., *The New Politics of Judicial Elections 2006* 15 (Justice At Stake 2006), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf [hereinafter *New Politics 2006*]. Increases in fundraising are reflected in a concomitant growth of expenditures, particularly on television advertising. In 2008, spending on television advertising in state supreme court races jumped 24 percent from 2006, reaching $19.8 million. Press Release, Brennan Center for Justice, *Buying Time-Spending Rockets Before Elections* (Nov. 13, 2008), http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/. And as the chart on page eight reflects, in just eight years, television advertising in state supreme court campaigns has gone from a rarity to a clear norm. Indeed,

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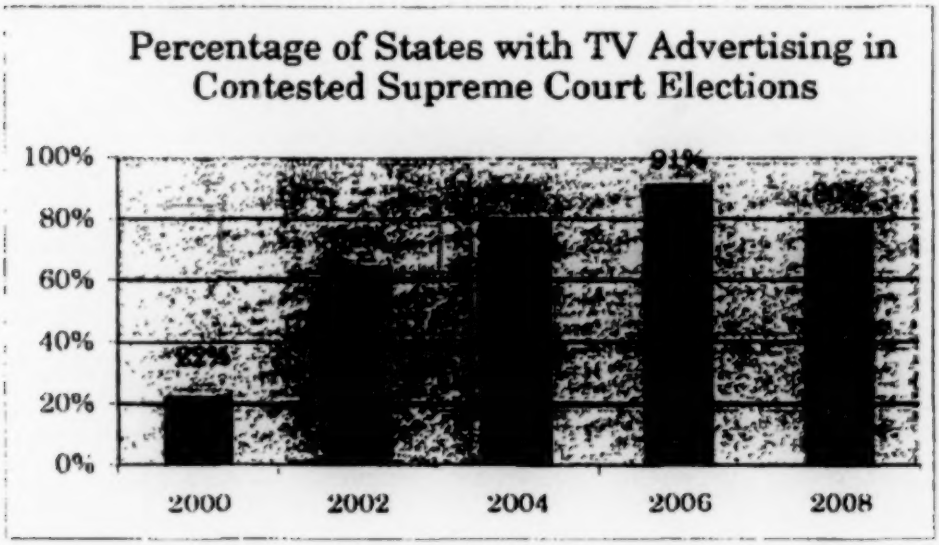
In Illinois, justices are first selected in partisan elections and thereafter stand in retention elections. In New Mexico, justices are appointed, but must run in a partisan election the first time they defend their office. After that, all elections are retention contests. In Montana, justices run in nonpartisan, contested elections; incumbents without an opponent run in retention elections. North Carolina held partisan elections until the 2004 cycle, when public funding was introduced and high court elections became nonpartisan. In Pennsylvania, candidates run for a first full term in partisan elections and run in retention elections thereafter.

from a judicial candidate's perspective, expensive advertising is, in most races, now a necessity for electoral success, regardless of whether paid for by the candidate's own campaign or by individuals like Mr. Blankenship and/or groups like And For The Sake Of The Kids.



[3]

Measured by the total number of television spots aired, in 2008, eight states – Idaho, Louisiana, Michigan, Mississippi, Nevada, Texas, Wisconsin, and West Virginia – had more television advertising in state

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[3] The Brennan Center's analyses of television advertising in state Supreme Court elections use data obtained from a commercial firm, TNS Media Intelligence/Campaign Media Analysis Group ("CMAG"), which records each ad via satellite. CMAG provides information about the location, dates, frequency, and estimated costs of each ad, as well as storyboards. Cost estimates are refined over time and do not include the costs of design and production. As a result, cost estimates substantially understate the actual cost of advertising.

supreme court races than in any election year since 2000. *Id.* Perhaps most tellingly, the $19.8 million spent on television advertising in supreme court races in 2008 reflects a 139 percent increase from just six years ago. *See* Deborah Goldberg et al., *The New Politics of Judicial Elections 2002* 7 (Justice At Stake 2002), *available at* http:// www.gavelgrab.org/wp-content/resources/NewPoliticsReport2002.pdf.

Wisconsin, Illinois, and Alabama offer illustrative snapshots of the trend:

- Less than two months after being disciplined by the Wisconsin Supreme Court for ruling, as a lower court judge, on eleven cases involving a bank for which her husband served as a director, Justice Annette Ziegler wrote the majority opinion in a 4-3 decision in favor of the position advocated by a group that spent over $2 million supporting her 2007 election. The group had "long considered the case a top priority." Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, Milwaukee J. Sentinel (Wis.), July 14, 2008, at A6. This year, Wisconsin surpassed the expenditure records set in Justice Ziegler's 2007 race. Interest groups ranging from trial lawyers and corporate organizations to tax opponents and teachers' unions combined to make Wisconsin's April 1, 2008 supreme court contest the most expensive judicial race in state history. Press Release, Wisconsin Democracy Campaign, *Nasty Supreme Court Race Cost Record $6 Million: Candidates Were Outspent $4 to $1 by Outside Special Interests* (July 22, 2008), *available at* http://wisdc.org/pr072208.php. Reflecting

on the developing state of affairs just one week after that contest, Justice Sandra Day O'Connor opened a conference by declaring, "We put cash in the courtrooms, and it's just wrong." Dorothy Samuels, Editorial Observer, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22.

• In a 2004 race for a seat on the Illinois Supreme Court, which is elected by district, two candidates raised more than $9.3 million combined, a figure that outpaced candidates in eighteen U.S. Senate races that year, and that was nearly double the previous national record for a judicial election. Deborah Goldberg et al., *The New Politics of Judicial Elections 2004* 14-15, 32 (Justice At Stake 2005), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf. The winner of the election, then-trial judge Lloyd Karmeier, reflected on the six-figure checks that poured into both campaigns, including from competing sides in a then-pending appeal, saying: "That's obscene for a judicial race. What does it gain the people? How can people have faith in the system?" *Id.* at 19.

• From 1993-2006, Alabama Supreme Court candidates raised in aggregate more than $54 million. *New Politics 2006*, at 15. In the 2005-06 election cycle alone, state supreme court candidates in Alabama raised $13.4 million, surpassing the previous state record by more than a million dollars. *Id.* The three candidates for chief justice raised a combined $8.2 million, making it the most expensive judicial race in

state history, and the second most expensive judicial campaign in American history. *Id.* at 15, 26. Alabama State Bar President Mark White recently put the sums into a sharp comparative perspective, noting that in 2006, candidates for judicial office in Alabama spent more than twice Alabama's total annual spending on civil legal services for the poor. Editorial, *Justice at Any Price*, The Birmingham News, July 23, 2008, at 2008 WL 13791071.

Unsurprisingly, the judicial candidate with the most funds in a race generally wins the election. In 2006, the candidate who raised the most money in state high court races won 68 percent of the time. In 2004, that figure was 85 percent. *New Politics 2006,* at vii. This dynamic poses a particularly nettlesome dilemma for judicial candidates, above and beyond the problems faced by other electoral candidates, due to the likely source of such funds: present and prospective litigants and counsel before the relevant courts. Former West Virginia Supreme Court Justice Richard Neely summarized the dilemma: "It's an absolute disaster for the judiciary. . . . Now every seat on the Supreme Court is for sale. . . . Judges will be required to dance with the one that brung them. . . . When someone like Don Blankenship offers you $3 million, you can't turn it down." Brad McElhinny, *Next Court Race Could Be Just as Nasty*, Charleston Daily Mail (W. Va.), Nov. 4, 2004, at 1A.

B. Massive Contributions And Expenditures By Present Or Prospective Litigants And Their Lawyers Threaten Due Process.

Increased campaign expenditures in judicial elections elicit public concern, but do not, standing alone, present a constitutional problem. Rather, the immediate constitutional concern involves campaign expenditures made in extraordinary amounts and under circumstances where an ordinary person cannot but conclude that they were made with the aim of securing a favorable outcome in a specific case in which the spender is a litigant or has some other substantial pecuniary interest.

Research by the National Institute on Money in State Politics identified and disaggregated 84 percent of directly contributed funds raised in 2005-06 state high court elections by interest group sector. Business interests represented the principal source of contributions, accounting for 44 percent of all contributed funds. Lawyers constituted the second largest source of contributions, accounting for 21 percent of all contributed funds. *New Politics 2006,* at 18, fig. 11.

The proportion of contributions to judicial candidates by lawyers and businesses may be partly explained by the belief among contributors that contributions will affect the outcome of cases in which they are involved. That this belief is pervasive is no longer in doubt. A study by the Texas State Bar and Texas Supreme Court found that 79 percent of

attorneys surveyed indicated their belief that campaign contributions have a significant influence on a judge's decision. Alexander Wohl, *Justice for Rent*, The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent.

The perception that campaign contributions buy influence on the bench in pending or imminent cases is so strong that litigants and lawyers give even when their candidate *cannot* lose. A recent *Los Angeles Times* study found that even Nevada judges running *unopposed* collected hundreds of thousands of campaign dollars from litigants and lawyers, frequently "within days of when a judge took action in the contributor's case." Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. Times, June 8, 2006, at A1.

The perception among contributing litigants and counsel is shared by their non-contributing counterparts. In a 2006 *amicus* brief urging this Court to grant *certiorari* in *Dimick v. Republican Party of Minnesota*, thirty-nine large national corporations stated: "*Amici* often have reasons for concern about – and many of them have had at least one experience of – receiving what appears to be less than fair and impartial justice in jurisdictions where they . . . have not contributed to . . . judicial candidates." Brief of *Amicus Curiae* Concerned Corps. in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102. As that brief shows, potential donors may feel locked

into a dynamic in which they have to give, regardless of whether they actually favor the recipient, as a result of the sheer prevalence and perceived influence of contributions. Similar concerns are echoed in two business-perspective *amicus* briefs filed in support of the Petitioners in this case. *See* Brief of Cmte. for Economic Development, Intel Corp., Lockheed Martin Corp., Pepsico, Wal-Mart Stores, Inc., Defense Trial Counsel of Indiana, The Illinois Ass'n of Defense Counsel, and Transparency International USA; Brief of Center for Political Accountability and the Zicklin Center for Business Ethics Research at the Wharton School.

Perceptions of improper influence are sustained by findings of strong correlations between contributions and litigation outcomes. A 2001 report on the Texas Supreme Court revealed that the average petitioner who gave the court $250,000 or more was ten times more likely than the average non-contributor to have a petition for discretionary review granted. The average petitioner who gave the court $100,000 or more was 7.5 times more likely than the average non-contributor to have a petition accepted. The report concluded that "across the board, the more a petitioner gave, the greater the likelihood that the court would accept a given petition." Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

A groundbreaking 2006 *New York Times* review of twelve years of Ohio Supreme Court decisions augmented

these findings. *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1 [hereinafter Liptak & Roberts]. The study found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved, and that they then voted in favor of those contributors 70 percent of the time. *Id.* One justice voted in favor of his contributors 91 percent of the time. *Id.*

This year, a study of the Louisiana Supreme Court went a step further by controlling for the baseline decisional tendencies of individual judges in cases involving non-contributors. The authors of the study concluded that "judicial voting favors plaintiffs' or defendants' positions not on the basis of judicial leaning or philosophical orientation but on the basis of the size and timing of a political donation." The study further found that the "higher the donation, the higher the odds that the contributor's position will prevail."[4]

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[4] Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291, 1314 (2008). This particular study, however, has recently been the subject of significant methodological and empirical criticisms. *See* Robert Newman et al., *A Critique of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function"* 1, 2 (2008), http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf (criticizing the study for failing to address whether expected voting behavior influences contributions, as well as whether contributions influence voting behavior); E. Phelps Gay & Kevin R. Tully,

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Because direct evidence of influence is generally unavailable since neither judges nor litigants readily admit to a *quid pro quo*, evidence of correlation is often the strongest evidence available of the causal connection between contributions and altered outcomes. Compounding the absence of direct proof, research on social psychology shows that much bias is unconscious and that people therefore tend to underestimate and undercorrect for their own biases and conflicts of interest.[5] Even candid self-reporting would therefore be likely to yield an undercount of influence. But, as Ohio Justice Paul E. Pfeifer has observed: "Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say." Liptak & Roberts.

Rebuttal of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function" 1, 10 (2008), http://www.lasc.org/press_room/press_releases/2008/Rebuttal_revised.pdf (noting errors in the data).

[5] *See, e.g.*, James Sample et al., *Fair Courts: Setting Recusal Standards* 20 (Brennan Center for Justice 2008), *available at* http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf [hereinafter *Setting Recusal Standards*] (summarizing studies); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier To Recognizing Conflicts of Interest*, *in* Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy 74 (Don A. Moore et al. eds., 2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781 (2004); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1248-50 (2002).

Aside from the risk of actual *quid pro quo*, cash from litigants has an inevitably corrosive effect on public confidence in America's courts. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 public poll. Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf. These results echo a 2001 nationwide poll, in which 76 percent of those surveyed stated their belief that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf. In that 2001 survey, 79 percent of the registered voters polled indicated their belief that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 10. The statistics illustrate that the public intuitively understands what jurists strive to prove: judicial independence matters, and the best indicator of whether courts are fair in a world too often lacking in direct evidence of improper influence is the appearance *vel non* of bias.

This case in particular has had a direct and substantial impact on public perceptions of judicial independence in West Virginia. A 2008 study by Talmey-Drake Research and Strategy found that over 67 percent of West Virginians doubted that Justice

Benjamin would be fair and impartial in considering this case. Only 15 percent of West Virginians believed that Justice Benjamin *could* be fair and impartial. Second Renewed Joint Mot. for Disqualification of Justice Benjamin 3.[6]

Members of the bench share the public's concern about the influence – perceived and at least occasionally real – of political contributions on the judicial process. In a written survey of 2,428 state lower, appellate, and supreme court judges, almost half (46 percent) of the judges surveyed indicated a belief that campaign contributions to judges influence decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake State Judges Frequency*

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[6] This sentiment was amply echoed in public forums such as editorial and letters pages. *See, e.g.*, Allan N. Karlin & John Cooper, Op-Ed., *Perception that Justice Can Be Bought Harms the Judiciary*, The Sunday Gazette Mail (W. Va.), Mar. 2, 2008, at 3C ("Nor is it surprising that West Virginians . . . 'reasonably question' Benjamin's ability to impartially sit on cases involving Blankenship's companies."); Editorial, *Benjamin Shows Need for Judicial Selection Reform*, Huntington Herald-Dispatch (W. Va.), Sept. 24, 2005, at 4A. ("Benjamin's case is more extreme than others, but the same concern applies to all."); Cecil E. Roberts, Op-Ed., *Blankenship's Hollow Rhetoric: His Money Defeated McGraw*, The Charleston Gazette (W. Va.), Dec. 13, 2004, at P5A ("Give us a break, Don . . . The real reason you bought the state Supreme Court seat is because Massey will soon stand before that court to try to rid itself of a $50 million jury penalty for putting . . . Harman Mining, out of business."); Eddie Tucker, Letter to the Editor, The Charleston Daily Mail (W. Va.), Dec. 10, 2004, at 4A ("Justice Brent Benjamin, as everyone knows, is bought and paid for by Blankenship.").

Questionnaire 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. More than 70 percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. As a result, more than 55 percent of state court judges believe that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

The above perceptions of contributors, non-contributors, members of the public, and members of the bench would plainly apply *a fortiori* when the source of funds is an active litigant's CEO and the amount in question is $3 million. Indeed, the overwhelming consistency of these perceptions is especially instructive since, in the first instance, Justice Benjamin was required to apply a state law recusal rule that requires disqualification whenever "the judge's impartiality might reasonably be questioned." *See infra* Part III.B. Well beyond that standard, however, the extreme facts of this case implicate due process because the "probability of actual bias . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Concerns about fiscal influence are cast into dramatic light by the startling sequence of events at issue in this case. In 2004, Mr. Blankenship made $517,707.53 in personal, direct expenditures in support of Justice Benjamin's candidacy, including radio and newspaper advertisements, campaign

fliers, and telephone calls to registered voters. Pet. Br. at 7. He also contributed millions of dollars more to Section 527 organizations that supported Justice Benjamin or opposed his opponent – more than any other person or group that election cycle. Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races* 5 (The Institute on Money in State Politics 2005), http://www.followthemoney.org/press/Reports/200508251.pdf. In all, Mr. Blankenship poured $3 million into the race – more than the entire amount spent on Justice Benjamin's campaign by all other supporters *combined* – all while Massey was planning to appeal a $50 million trial court verdict to the court on which Justice Benjamin would sit. Pet. Br. at 6-7.

Even members of Justice Benjamin's own bench recognize the toll exacted by his refusal to recuse in this case. In the words of Justice Larry Starcher, "Mr. Blankenship's bestowal of his personal wealth" has created "a cancer in the affairs of [West Virginia's] court." Starcher Recusal Order at 9 (J.A. 460a). Justice Starcher added that he knew "hardly a soul who could believe" that a justice in Justice Benjamin's position vis-à-vis Mr. Blankenship "could rule fairly on cases involving that litigant or his companies – or appoint judges to sit on those cases." *Id.* at 7 (J.A. 459a-60a).

Elected legislators are expected to serve interest-group constituencies, including contributors. The representative branches function best when officials are lobbied by contributors and non-contributors

alike. Judges, including elected judges, are different in constitutionally salient ways. Judges are responsible for the fundamental promise of fair, impartially-decided cases. Judges function properly when they are "lobbied" only within the structured adversarial process and solely on the basis of law – not on the basis of personal, financial, or electoral interests. Everyone suffers when a judicial decision reinforces suspicions that the biggest donor, not the best case, wins.

II. The Fact That Mr. Blankenship Made Political Expenditures Rather Than Direct Contributions Does Not Alter The Due Process Analysis.

Respondents wrongly contend that the fact that Mr. Blankenship's support predominantly took the form of expenditures supporting Justice Benjamin, rather than contributions directly to Justice Benjamin, is significant to the Court's due process analysis in this case. *See, e.g.*, Br. for Respondents in Opposition at 20.

Just as large contributions directly to a judicial candidate "threaten the integrity of judicial selection and compromise the public perception of judicial decisions," Sandra Day O'Connor, Op-Ed, *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25, so too do large expenditures made explicitly for the purpose of supporting a judicial candidate. To assert otherwise defies logic.

Mr. Blankenship's $3 million in expenditures were, by legal definition, for the purpose of influencing the election. Mr. Blankenship spent $517,707 that he reported to the State as "expenditures" on W. Va. Official Form F-7B. Br. for Respondents in Opposition at 4. Form F-7B is used only to report an expenditure "for a communication which expressly advocates the election or defeat of a clearly identified candidate. . . ." Disqual. Mtn. Ex. 18 (Form F-7B); *see also* W. Va. Code § 3-8-1a(16) (defining "independent expenditure").

Mr. Blankenship spent an additional $2,460,500 through And For The Sake Of The Kids – a group registered with the Internal Revenue Service as a "political organization" under Section 527 of the federal tax code operated "primarily for the purpose" of "influencing or attempting to influence the selection, nomination, election, or appointment" of individuals to public office. 26 U.S.C. § 527(e)(1)-(2) (defining "political organization" and "exempt function"); *see also* Pet. Br. at 7, 34. According to Mr. Blankenship, And For The Sake Of The Kids was formed after the verdict in this case for the purpose of "beat[ing] Warren McGraw," Justice Benjamin's opponent. Pet. at 6.

While the Court has held that certain restrictions on campaign spending implicate the First Amendment, this case involves no such restrictions. This case is only about recusal when parties or counsel in a pending suit give massive support to a candidate who sits or intends to sit in that case.

Laws that limit political expenditures have traditionally been found by courts to burden a spender's First Amendment rights and, consequently, have traditionally been subject to exacting scrutiny. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (invalidating various political expenditure limits). By contrast, a legal regime that permits unlimited political expenditures and merely requires recusal by a justice who benefits from substantial political expenditures safeguards due process while in no way burdening the First Amendment rights of the spender who, notwithstanding the recusal, has her case decided by an impartial court.

This case, in which Mr. Blankenship's expenditures accounted for 60 percent of all combined support for Justice Benjamin, allows the Court to resolve the due process issues without any need for inquiry into the permissibility of restrictions on expenditures supporting a candidate vis-à-vis contributions to a candidate. As a practical matter, distinctions between contributions and expenditures have only marginal salience when it comes to the fundamental fairness concerns at the core of due process. *Amici* agree with Petitioners that the amount of money involved, the fact that Mr. Blankenship's expenditures represented more than half of the total amount spent supporting Justice Benjamin, the fact that the money was used by Mr. Blankenship explicitly for the purpose of influencing the election of Justice Benjamin, and the fact that Justice Benjamin played a critical role in Mr. Blankenship's appeal of a $50 million damages

verdict against his company, created "an overwhelming probability of bias that required Justice Benjamin to recuse himself." Pet. Br. at 17.

Whatever First Amendment interest a litigant or counsel has in contributing or spending in a campaign, he or she has no constitutionally-protected interest in gaining an unfair litigation advantage on that basis. The Due Process Clause requires recusal under these circumstances.

III. Reversal In This Bellwether Case Would Substantially Clarify The Due Process Floor For Recusal.

A. Due Process Entitles Litigants To A Judge Free Of Bias Or The Appearance Of Bias.

This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Yet this Court has also recognized the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). The facts of this case show that this tension is no mere theoretical possibility. As this Court expressly found in *White*, preventing bias for or against particular parties is essential under the Due Process Clause. 536 U.S. at 775-76. It is precisely this narrow form of bias that is at issue here. There could scarcely be an instance in which there is a more acute need for this Court to reinforce the "stringent

rule" articulated in *Murchison*, namely, that to "perform its high function in the best way justice must satisfy the appearance of justice" even though such a rule "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." 349 U.S. at 136 (internal quotation marks omitted).

In his year-end report on the federal courts, Chief Justice Roberts underscored the core concern at issue in this case: America's courts "guarantee that those who seek justice have access to a fair forum where all enter as equals and disputes are resolved impartially under the rule of law." Chief Justice John G. Roberts, Jr., 2008 Year-End Report on the Federal Judiciary 7 (Dec. 31, 2008) *available at* http://supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf. A judge generally has only two litigants before him or her. What follows is almost always a zero-sum game: one litigant wins, one loses. The prize at stake may be a large amount of money, one's freedom, or even one's life. Accordingly, maintaining the integrity of the judiciary and respect for its judgments is a state interest "of the highest order." *White*, 536 U.S. at 793 (Kennedy, J., concurring); *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (explaining that a state may protect against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process").

Recusal is an incomplete but vital fairness protection. Yet, without this Court's intervention, recusal

is in danger of becoming a nullity, invoked only out of altruism – and as such, variably and unpredictably – disadvantaging litigants and diminishing the courts.

B. Variable Enforcement Of Recusal Standards Is Becoming The Norm, Exacerbating The Due Process Problem.

Certain features of disqualification law are largely consistent across United States jurisdictions. The most widely shared is Rule 2.11(A) of the American Bar Association's 2007 Model Code of Judicial Conduct (formerly Canon 3E(1)): "A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality *might* reasonably be questioned." ABA Model Code of Judicial Conduct Canon 2 R. 2.11 (2007) (emphases added). That general standard has been incorporated into federal law and the judicial conduct codes of forty-seven states, and it offers the most expansive ground for disqualification everywhere it appears. *Setting Recusal Standards*, at 17.

For the most part, this general standard works well as a protection for due process values. But in certain instances, such as in this case, a judge either fails to apply the general standard, or simply refuses to recognize that it is unquestionably unreasonable *not* to conclude that his or her impartiality "might reasonably be questioned." It is in such instances that litigants and judges need guidance as to when recusal is constitutionally required, especially in the context of highly financed judicial election campaigns. A

scenario in which, for example, ninety-nine out of one-hundred judges adhere to the general disqualification standard while an isolated colleague ignores it without consequence – even in cases that, under the standard, cannot credibly be described as "close" – encourages and induces precisely the most dangerous attempts to purchase influence. Such a state of affairs harms not only litigants and the public, but the ninety-nine other judges as well.

This case is that scenario in microcosm.[7] Justice Benjamin refused to recuse himself based upon his subjective belief that he could be fair, while Justice Starcher did recuse himself, despite a finding that he too could be fair, based upon the further finding that his failure to recuse himself could create an appearance of impropriety. As this Court observed in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all."

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[7] The overwhelming appearance of impropriety created by Justice Benjamin's refusal to recuse himself is reinforced by the remarkable array of *amici* supporting Petitioners, including, notably, twenty-seven former state supreme court chief justices and justices from across the country. *See* Brief of Former State Supreme Court Justices at 5 ("*Amici uniformly* believe that the participation of Justice Benjamin in this case created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefitted from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court.") (emphasis added).

Amici do not suggest that *any* campaign expenditure by a litigant on behalf of a judge necessitates disqualification. But the proposition that campaign expenditures, regardless of the amounts, timing, or manner in which they are made never cross over "the outer boundaries" of judicial qualification established by the Due Process Clause would in effect nullify one of the Constitution's most fundamental protections. *Lavoie*, 475 U.S. at 828.

As the Hon. Thomas R. Phillips, retired Chief Justice of the Supreme Court of Texas recently wrote: "Now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment." *Setting Recusal Standards*, at 3.

Unfortunately, Chief Justice Phillips's exhortation, as with Justice Kennedy's encouragement in *White* that states consider adopting "more rigorous" recusal measures, runs counter to powerful dynamics of institutional inertia that have, on the whole, prevented systemic reinvigoration from occurring. The result, despite widespread compliance, is that isolated, but increasingly troublesome outlier scenarios such as in this case, occur without consequence. Absent reinforcement by this Court of the constitutional "outer boundaries" of judicial qualification in this case, there is every reason to believe such instances will continue to flourish, causing harm to litigants, damage to the judiciary, and a loss of faith in the rule of law.

By identifying this case as a violation of due process, the Court would signal to judges, litigants, and counsel across the nation that disqualification standards, and their due-process underpinnings, must be taken seriously. The communicative impact of a reversal and remand, moreover, would discourage future erosion of judicial impartiality. Not only would such a signal bolster the efforts of the vast majority of the nation's state court judges, *i.e.*, those committed to the highest ideals of due process, but it would do so without extensively involving the Court in jurisdictionally unique and otherwise idiosyncratic circumstances best addressed by the state courts themselves.

C. A Failure To Identify This Important And Unique Case As Beneath The Floor Of Due Process Would Harm Judicial Independence.

The national profile of this bellwether case makes it all the more important that this Court unequivocally reverse and remand for reconsideration without Justice Benjamin. *See, e.g.*, Editorial, *Tainted Justice*, N.Y. Times, Nov. 13, 2008, at A36; Tim Jones, *Lobbyist Cash Clouds Judicial Races*, Chicago Tribune, July 28, 2008, at C1; Dorothy Samuels, Editorial Observer, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22; Len Boselovic, *W. Va. Ruling Faces Appeal to Top Court; Mining Firm Claims Bias in Favor of Massey*, Pittsburgh Post-Gazette (Pa.), April 4, 2008,

at A1; Kris Maher, *Massey Wins Latest Round with Harman*, Wall St. J., April 4, 2008, at B4; James Sample, Op-Ed., *Justice for Sale*, Wall St. J., Mar. 22, 2008, at A24; Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, Wash. Post, Nov. 4, 2004, at A15. The nation is watching closely what the Court does in this case. Litigants and their lawyers would interpret a decision to affirm as an indication that even a blatant appearance of partiality does not lead to correction, and that, in effect, there are no real due process constraints on recusal. Such a ruling may well trigger a rapid race to the bottom, as litigants, particularly those in the position of Petitioners in this case, are forced to come to terms with the possibility that, at least in certain instances, justice may actually be for sale.

Only if this Court reverses and remands to the West Virginia Supreme Court of Appeals for further proceedings without any involvement by Justice Benjamin can it put appropriate muscle in the constitutional commitment to judicial impartiality.

The $3 million in expenditures; the fact that those expenditures represented more than all other financial support for Justice Benjamin *combined*; the sole interested source of those funds; the timing of the expenditures; and the other facts of this case are so egregious – by today's standards at least – that they offer the Court the ideal opportunity to reinforce one of the most fundamental rights in *any* system based on the rule of law: the right to a fair hearing before an impartial arbiter.

CONCLUSION

For the foregoing reasons, Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings.

Respectfully submitted,

JAMES J. SAMPLE
Counsel of Record
AZIZ HUQ
J. ADAM SKAGGS
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW,
Suite 650
Washington, DC 20036
(202) 736-2200

Counsel for Amici Curiae

Dated: January 5, 2009

AMICUS CURIAE BRIEF

No. 08-22

IN THE

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF RESPONDENTS

STEPHEN M. HOERSTING
Counsel of Record
BRADLEY A. SMITH
REID ALAN COX
CENTER FOR COMPETITIVE POLITICS
124 S. West Street
Suite 201
Alexandria, VA 22314
(703) 894-6800

Counsel for Amicus Curiae

February 4, 2009

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BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, a professor of law at Capital University Law School and a former chairman of

[1] The parties have consented to the filing of this brief. Both Petitioners and Respondents filed letters with this Court consenting to the submission of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the Federal Election Commission, and Stephen M. Hoersting, a campaign finance attorney and a former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

Petitioners and their supporting *amici* should not be permitted to use this case as a backdoor attempt to undermine this Court's holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). For simple analysis leads to an inescapable conclusion: If this Court rules that independent expenditures create an unconstitutional "bias," its "probability," or even its "appearance," in elected judges that do not recuse, then lower courts will, in the fullness of time, infer that independent expenditures create "corruption or its appearance" in elected legislators that do not abstain, contrary to this Court's 33-year-old holding in *Buckley*, with *Buckley* being the inevitable casualty.

This Court should find no violation of the Fourteenth Amendment's Due Process Clause in this case. West Virginia's remedy—should it choose to rid itself of an unwanted, though not unconstitutional, "appearance"—is in appointing its judges, or, more likely, in recusal standards more rigorous than constitutional due process requires.

ARGUMENT

This case harbors a potentially unwise and unworkable expansion of this Court's due process jurisprudence. But it carries an equally serious and troubling potential to damage this Court's First Amendment jurisprudence in the context of campaign finance and elections dating back to at least the time of *Buckley v. Valeo*, 424 U.S. 1 (1976), including, among numerous other cases and lines of authority, this Court's recent decision on free speech in judicial elections, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). It is the implications for free speech and association through campaign financing both in legislative and judicial campaigns that *Amicus* will discuss here.

From the perspective of campaign finance law, the important facts are these: A West Virginia jury returned a verdict against Respondents, A.T. Massey Coal Company, Inc., *et al.* ("Massey"), for "tortious interference with . . . contractual relations, fraudulent misrepresentation, and fraudulent concealment," and assessed compensatory and punitive damages in the amount of more than $50 million, all for actions taken by Massey at the direction of its CEO, Don L. Blankenship. Pet'rs' Br. at 5. Mr. Blankenship swore publicly that he would appeal. *See id.* The record shows that subsequently, Mr. Blankenship, (a personal owner of 250,000 shares, or 1%, of Massey stock), made independent expenditures[2] of approx-

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[2] *Amicus* will describe Mr. Blankenship's independent speech and his contributions (or donations as the case may be) to "And for the Sake of the Kids" as "independent expenditures," though *Amicus* understands from the record that not all of the communications may have contained express words of election or defeat. *See Buckley*, 424 U.S. at 44 n.52. While the express

imately $3 million of his personal funds (*i.e.*, not Massey funds), to support the election of Brent Benjamin (and oppose the reelection of incumbent Justice Warren McGraw) to the West Virginia Supreme Court of Appeals. *See id.* If the jury and record are to be believed, and *Amicus* has no reason to believe otherwise, Mr. Blankenship appears to have treated his business competitors in a manner that blackens the names of honest industrialists everywhere. But there is no evidence that Mr. Blankenship ever conferred with Brent Benjamin about his decision to run for Justice, or about Mr. Blankenship's decision to spend the money, or how to spend his money, or indeed on any subject at all.

Such easy facts as bribing a judicial candidate or sale of public office do not makeup the record in this case. Petitioners may assert that Brent Benjamin was "a previously unknown lawyer," perhaps in the hope that this Court will infer Mr. Blankenship plucked Brent Benjamin from obscurity to run against Mr. Blankenship's nemesis, incumbent Justice Warren McGraw, all for the price of voting for Massey when the time came.[3] But this record supports no such inference and such unsupported innuendo cannot inform the Court's holding in this case.[4]

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advocacy distinction is of critical importance to campaign finance law, clarifying the distinction in this case is less critical.

[3] Petitioners, however, fail to explain how "a previously unknown lawyer" could receive the endorsements of all but one of the major West Virginia daily newspapers to offer endorsements shortly before the election, as did Candidate Benjamin. J.A. 674a n.27; *see also* Resp'ts' Br. at 5 & 54.

[4] If Brent Benjamin were handpicked by Mr. Blankenship and asked to run for Justice on the West Virginia Supreme Court of Appeals in exchange for an eventual vote in this case,

Contemptible as Mr. Blankenship's treatment of Petitioners may be, this Court ought not hold, first, that Mr. Blankenship's independent expenditures triggered a constitutional duty in Justice Benjamin to recuse in the Massey litigation, and, second, that Justice Benjamin's failure to recuse resulted in a denial of due process to Petitioners. Such a holding would not only be an unwise extension of this Court's due process jurisprudence, it would overturn *sub rosa* this Court's consistent holdings in *Buckley*, *Massachusetts Citizens for Life*, through *Randall*, that independent political speech does not pose the threat of "corruption or the appearance of corruption," *see Randall v. Sorrell*, 548 U.S. 230 (2006); *Federal Election Comm'n v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976); and undermine this Court's ruling in *White* that States must respect the First Amendment in judicial elections. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

I. INDEPENDENT EXPENDITURES IN ELECTION CAMPAIGNS DO NOT CAUSE "BIAS" AS DEFINED BY THIS COURT

Generally speaking, "bias" is incompatible with due process where an adjudicator has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against [a litigant] in the case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). "Bias" also occurs in special

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this matter would not be before this Court, and the law would have dealt with both men severely. *See generally* W. VA. CODE §§ 61-5-4 (making bribery unlawful); 61-5-5 (making demanding bribes unlawful); 61-5A-1 (Bribery and Corrupt Practices Act), 61-5A-3 (making bribery in official and political matters unlawful), 61-5A-4 (unlawful rewarding of public servants for past behavior).

cases, such as contempt proceedings, where the adjudicator has "been the target of personal abuse or criticism from the party before him." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).[5] Independent expenditures cannot be determined to create such bias without overruling this Court's longstanding jurisprudence that independent expenditures are not and cannot be corrupting.

A. Independent Expenditures In A Judicial Election Do Not Create A Direct, Personal, Substantial, Pecuniary Interest In A Candidate That Becomes A Judge

Justice Benjamin did not have a direct, personal, substantial, pecuniary interest in Mr. Blankenship's independent expenditures. Furthermore, Justice Benjamin was not the target of personal abuse or criticism from Petitioners when they appeared before him in the underlying appeal. The record shows no relationship or interest between Mr. Blankenship and Justice Benjamin other than $1,000 contributions to Justice Benjamin's campaign committee by Mr. Blankenship (J.A. 208a) and Massey's PAC (J.A. 242a). Petitioners concede that these lawful contributions are not evidence of bias on the part of Justice Benjamin. *See* Pet'rs' Br. at 16, 26.

Nothing in the record suggests that Mr. Blankenship handpicked Brent Benjamin to run against incumbent Justice Warren McGraw, either directly or through an intermediary. Brent Benjamin chose to campaign to be a Justice of the West Virginia Su-

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[5] For a detailed explanation of due process, the bias standard, and the infirmity of any so-called "appearance of bias" or "probability of bias" standards, *see* Respondents' Brief at 15-27.

preme Court of Appeals independently of Mr. Blankenship. *See* Pet'rs' Br. at 1-2. Likewise, Mr. Blankenship chose to speak through independent expenditures independently of Candidate Benjamin, and may have done so regardless of the identity of incumbent Justice McGraw's opponent. *See id.* at 2. There is no suggestion that Mr. Blankenship coordinated his independent spending with Brent Benjamin or with any member of Justice Benjamin's campaign. *See id.* at 17, 34 (acknowledging that "Justice Benjamin['s] . . . 'campaign was completely independent of any independent expenditure group,' including And For The Sake Of The Kids") (citing J.A. 673a). Mr. Blankenship's independent spending did not go to Brent Benjamin personally, or even to Candidate Benjamin's campaign account, beyond the $1,000 personal contribution and a $1,000 contribution from Massey's PAC's that Petitioners concede raise no due process concern. *See id.* at 7.

This independence and separation is in marked distinction from this Court's line of due process cases, which require a "direct, personal, substantial, pecuniary interest" on the part of a judge or adjudicator before constitutional due process is offended. *See, e.g., Tumey*, 273 U.S. at 523. Indeed, this Court's due process jurisprudence marks a difference in kind to the situation involving Justice Benjamin, not a mere difference of degree.

Case after case demonstrates the difference. *Tumey* involved a mayor/adjudicator who earned a percentage of every fine he assessed against bootleggers. *See generally Tumey v. Ohio*, 273 U.S. 510 (1927). *Lavoie* involved a state supreme court justice who would receive damages in a pending bad-faith claim against his insurer only if he first upheld the

constitutionality of bad-faith claims against all insurers. *See generally Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). And, *Mayberry* involved a judge who had a personal stake in protecting his reputation from a litigant that attacked him in court, personally and repeatedly, calling the judge a "dirty, tyrannical old dog," a "dirty sonofabitch." *See generally Mayberry v. Pennsylvania*, 400 U.S. 455, 456-57 (1971). Even in *Ward*, the mayor was certain that by fining more traffic offenders he would further his responsibilities for revenue production and law enforcement. *See generally Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Whether Justice Benjamin would have won but for Mr. Blankenship's actions is highly speculative. Candidate Benjamin did, in fact, raise nearly $850,000 for his campaign. *See* Pet'rs' Br. at 28 n.4. Other groups and individuals besides Mr. Blankenship made hundreds of thousands of dollars in independent expenditures. Every major daily newspaper in the state save one endorsed Benjamin for the office. *See* J.A. 674a n.27; *see also* Resp'ts' Br. at 5, 54. Moreover, having been elected to office with no *quid pro quo* or even vague understanding owed to Mr. Blankenship, Justice Benjamin could not be at all certain that his reelection more than eight years hence would result if he ruled for Massey—particularly if Mr. Blankenship is the unscrupulous and ruthless character lacking in loyalty or fair play that Petitioners portray. The idea that Justice Benjamin would obtain a "'direct, personal, substantial, pecuniary'" benefit by finding for Massey is at best "highly speculative." *Lavoie*, 475 U.S. at 822 (citation omitted), 826.

B. Even If The Court Adopted An "Appearance Of Bias" or "Probability of Bias" Standard, Independent Expenditures In A Judicial Campaign Do Not Cause An "Appearance" or "Probability" Of Bias In The Judge Elected

Brent Benjamin did not "get" $3 million. The most that can be said that he "got" was elected, though this was necessarily the result of many factors, not the least of which were the intervening decisions of hundreds of thousands of West Virginia voters. While Candidate Benjamin can control contributions made directly to his campaign account (and has the ability to refund them), he has no control over independent expenditures made by third parties, and no ability to refuse or refund them. The record does not support the conclusion that Justice Benjamin's ruling in this underlying case was a payoff (*quo*) for Mr. Blankenship's spending (*quid*). And as the independent expenditures—made two years before this case ever reached the West Virginia Supreme Court of Appeals—could not be undone, Mr. Blankenship could neither withhold nor demand refund of the $3 million he had spent if Justice Benjamin had ruled against Massey, and for Petitioners, in the underlying appeal. As it is said in contract law, more in recognition of reality than as an aspiration, "it is . . . well settled that past consideration is no consideration." *See, e.g., Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) (citing *Glascock v. Comm'r of Internal Revenue*, 104 F.2d 475, 477 (4th Cir. 1939); 1 WILLISTON ON CONTRACTS § 142 (3d ed. 1957)). That statement is no less true where, as in the case here, there is not even the allegation of an agreement or relationship between the parties.

Furthermore, if election or defeat is all that is at stake for Justice Benjamin eight years hence, Justice Benjamin's actions in this case, the resulting media firestorm, and anger throughout West Virginia and many quarters of this nation, may far from ensure his reelection but rather damage his prospects for it. In short, Justice Benjamin's failure to recuse in the Massey matter may actually make him vulnerable at reelection time.[6] Moreover, Justice Benjamin was almost certainly aware of this at the time he heard the Massey case, both on the merits and the recusal motions. As Justice O'Connor stated while criticizing the election of judges generally, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *White*, 536 U.S. at 789 (O'Connor, J., concurring). For years, in

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[6] *See, e.g.*, Allan N. Karlin & John Cooper, Editorial, *Perception that justice can be bought harms the judiciary*, THE SUNDAY GAZETTE MAIL (Charleston, W. Va.), Mar. 2, 2008, at 3C; Editorial, *Finally*, REGISTER HERALD (Beckley, W. Va.), Feb. 18, 2008; Editorial, *Bravo*, CHARLESTON GAZETTE (W. Va.), Feb. 16, 2008, at 4A; William Kistner, *Justice for Sale*, AMERICAN RADIOWORKS (2005) (available at <http://americanradioworks.publicradio.org/features/judges/>); Cecil E. Roberts, Editorial, *Blankenship's hollow rhetoric: His money defeated McGraw, now he must help miners*, CHARLESTON GAZETTE (W. Va.), Dec. 13, 2004, at P5A; Edward Peeks, Editorial, *How Does Political Cash Help Uninsured?*, CHARLESTON GAZETTE (W. Va.), Nov. 9, 2004, at 2D; Brad McElhinny, *Next court race could be just as nasty: Justice Larry Starcher could be a target in 2008 if he seeks to stay on bench*, CHARLESTON DAILY MAIL (W. Va.), Nov. 4, 2004, at 1A; Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15; *Cf.* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1; Paul J. Nyden, *Coal companies provide big campaign bucks: Brent Benjamin raking in heaviest contributions*, CHARLESTON GAZETTE (W. Va.), Oct. 15, 2004, at 1A.

the face of numerous studies that have found that campaign contributions play no statistically significant role in legislator behavior, those favoring restrictions on political speech in the form of limitations on campaign contributions and independent expenditures have argued that the influence to be feared comes in issues, out of the limelight. *See e.g.*, E. Joshua Rosenkranz, *Faulty Assumptions in 'Faulty Assumptions'*, 30 CONN. L. REV. 867, 879 (1998) (arguing that studies showing that campaign contributions have little effect on a legislator's behavior should be disregarded because the influence of contributions is found in "stealth issues . . . on which public attention is not focused.") If, however, there was ever a judicial "issue" of high public interest, this case is it. Justice Benjamin will face a tough reelection contest for his alleged role in the Massey affair and his failure to recuse—and Justice Benjamin knew it at the time he decided not to recuse, just as he knows it now. *See, e.g.*, J.A. 667a-672a, 691a-697a (Benjamin, Acting C.J., concurring). Thus, Justice Benjamin is not indebted to Mr. Blankenship or to Massey. And if we are to presume a bias, a "probability" of bias, or even the "appearance" of one, it would as likely have been to rule *against* Massey in the underlying action, not for it.

II. UNDER THIS COURT'S LONGSTANDING FIRST AMENDMENT JURISPRUDENCE, NEITHER THE "INTENT" OF THE SPEAKER, NOR ANY PURPORTED "BENEFIT" TO, OR "GRATITUDE" OF, A CANDIDATE RESULTING FROM INDEPENDENT EXPENDITURES CREATES "BIAS," ITS "APPEARANCE," OR ITS "PROBABILITY" IN A JUDGE

A State may regulate the "procedures under which its laws are carried out . . . and its decision in this re-

gard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Lavoie*, 475 U.S. at 820-21. Independent expenditures in judicial elections, however, do not "offend" a "principle . . . so rooted in the traditions . . . of our people." Independent expenditures in elections *are* an embedded tradition of our people and a fundamental part of our political process. Nonetheless, Petitioners claim that "[t]he likelihood that Justice Benjamin harbored, and sought to repay [a] debt of gratitude . . . is *not diminished* by Mr. Blankenship's use of independent expenditures, rather than direct contributions, to furnish his financial support." Pet'rs' Br. at 17 (emphasis added). But this Court in *Buckley* has said it is, indeed, diminished, and any expansion of "bias" under this Court's due process jurisprudence would erode the Court's First Amendment jurisprudence on campaign expenditures, affirmed most recently in *Randall*, 548 U.S. at 241-46.

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has repeatedly shown that it will only find corruption or its appearance in situations that involve direct contributions to candidates or to groups intimately associated with candidates.[7] Contribution limits "prevent[ ] corruption and the appearance of

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[7] The single narrow exception to this statement, so-called "corporate-form corruption," is not applicable to this case. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (identifying the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" as "a different type of corruption").

corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions," *id.* at 25, "while leaving persons free to engage in independent political expression and to associate actively through volunteering their services," *id.* at 28.

"Unlike [direct candidate] contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 46. As the Court explained, the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 46-47.[8] The Court's analysis retains its validity to-

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[8] In their brief, Petitioners mischaracterize and attempt to rely on a statement from *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652 (2007), to assert "there is no reason to believe Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because . . . his financial support was provided through" wholly independent, rather than direct, means. *See* Pet'rs' Br. at 34 (citing *WRTL II*, 127 S. Ct. at 2672). In *WRTL II*, Chief Justice Roberts wrote: "We have suggested that this interest [in preventing corruption] might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" 127 S. Ct. at 2672 (quoting *Buckley*, 424 U.S. at 45). Chief Justice Roberts, in turn, was quoting *Buckley*, which stated: "First, assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, [FECA's expenditure limit] does not provide an answer that sufficiently relates to the elimination of those dangers." 424 U.S. at 45. So what this Court has really said on the topic is not the unequivocal

day. For example, Professor Roy Schotland has documented instances in which independent expenditures in state judicial elections have "backfired" against the preferred candidates. *See, e.g.*, Roy A. Schotland, *Comment on Professor Carrington's Article "The Independence and Democratic Accountability of the Supreme Court of Ohio"*, 30 CAP. U. L. REV. 489, 490 (2002). Judicial elections are elections, no less so than any other. *See generally White*, 536 U.S. at 784-88 (including statements noting that "the difference between judicial and legislative elections" is "greatly exaggerate[d]," and that "the First Amendment does not permit . . . leaving the principle of elections in place while preventing . . . discussi[on concerning] what the elections are about"). Therefore, even if an "appearance of bias" were the standard appropriate to determine whether judicial recusal was mandated by the Fourteenth Amendment's Due Process Clause, independent expenditures do not create an "appearance of bias," just as independent expenditures do not create an "appearance of corruption." *See, e.g.*, *Buckley*, 424 U.S. at 46; *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). So long as a State chooses its judges by popular election, those elections must permit the speech of independent speakers. The "'power to dispense with elections altogether does not include the

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statement (cited by Petitioners) that "in some circumstances, large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions," but rather the ridiculously equivocal statement that, *for the purpose of argument*, the Supreme Court has *suggested* that the interest in combating corruption *might* justify *some* limits on expenditures because it *may* be, in *some* circumstances, that they pose a risk of corruption. And then this Court proceeded to strike down expenditure limits in FECA.

lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *White*, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted). According participants the free speech and association rights that attach to their roles in judicial elections is no violation of due process, for "[j]udicial elections were generally partisan during" the "19th and [early] 20th centur[ies]," with "the movement toward nonpartisan judicial elections not even beginning until the 1870's." *White*, 536 U.S. at 785.

A. A Purported "Benefit" To Candidate Benjamin From Independent Expenditures Is Not Enough To Create "Bias" In Justice Benjamin, And A Finding That Any Purported "Gratitude" Creates "Bias" Would Prove Too Much

Petitioners claim that Mr. Blankenship's "strong personal and professional interest in the outcome of the case . . . created a compelling reason for Justice Benjamin to [have and] repay [a] debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey's favor." Pet'rs' Br. at 17. In short, Petitioners argue that Candidate Benjamin "benefited" from Mr. Blankenship's spending, was "grateful" for it, and, thus, was *compelled* to repay Mr. Blankenship for it. This last leap in logic, however, is unsupported by either the record or the law.

First, this Court has explicitly rejected the argument that Congress may restrict the funding of independent activity that merely "benefits" a candidate.

See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 156 n.51 (2003) ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate.") (emphasis in original)[9]; *see also id.* at 354-55 (Rehnquist, C.J., dissenting).

Second, Petitioners' related argument—that Justice Benjamin's alleged "gratitude" for Mr. Blankenship's independent expenditures caused Justice Benjamin to be unconstitutionally biased on behalf of Massey—would prove too much. Its logic can be extended to find "bias" in any of a range of other independent political activity, in multiple forms and from multiple sources, long recognized as vital to democracy. A group of community organizers that work to get out the vote in neighborhoods that disproportionately support a candidate would "benefit" that candidate and may make him "grateful." But would it violate due process to have those organizations appear in a case before him? How about the community members who lead or participate in the organizations?

Candidates may enjoy disproportionate popularity among environmentalists, or women, or union members, or residents of a certain geographical area, etc.;

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[9] That the independent groups addressed were members of the institutional press is of no constitutional significance. "'[The] purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater and no less . . ." than the liberty of every citizen of the Republic.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (quoting *Pennekamp v. Fla.*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).

the votes of such interest groups are also valuable to the candidate. Does it violate due process for a judge to sit in a case where these groups, or their members or supporters, appear before him?

Millions of dollars were spent by non-profit organizations in West Virginia opposing Candidate Benjamin. One independent opponent organization, West Virginia Consumers for Justice, received approximately $2 million in contributions, including approximately $1.5 million from members of the plaintiffs' bar, as well as $10,000 from Petitioner Caperton and $15,000 from a law firm that represents Petitioners in this case (Buchanan Ingersoll). *See* John O'Brien, *Caperton was anti-Benjamin from the start,* W. VA. RECORD, Jan. 24, 2008 (available at <https://wvrecord.com/news/206942-caperton-was-anti-benjamin-from-the-start>). And there were other independent groups beside And for the Sake of the Kids that opposed incumbent Justice McGraw. Citizens for Quality Health Care, funded in part by the West Virginia Chamber of Commerce, spent nearly $370,000 on anti-McGraw advertisements. *See* Paul J. Nyden, *Coal, doctors' groups donated to anti-McGraw effort: Massey President Donald Blankenship remains largest donor,* CHARLESTON GAZETTE, Jan. 7, 2005, at P5A. Citizens Against Lawsuit Abuse also ran critical ads. *See* Juliet A. Terry, *Benjamin Hopes to Shine Light on Justice,* STATE J., Nov. 5, 2004, at 4. Would it violate the Fourteenth Amendment's Due Process Clause if Justice Benjamin—or Justice Warren McGraw had he won—were to hear a case involving any of these parties? Or heard a matter involving any of their contributors, members, volunteers, or supporters?

Judicial candidates and officeholders often feel gratitude toward media outlets that endorse their candidacies. Studies of the electoral effects of newspaper endorsements indicate that such endorsements are typically worth between one and five percentage points to a candidate. Stephen Ansolabehere, Rebecca Lessem & James M. Snyder, Jr., *The Orientation of Newspaper Endorsements in U.S. Elections, 1940-2002*, 1 Q. J. OF POL. SCI. 393, 394 & n.2 (2006) (collecting citations and data from a number of studies, and observing that a "range of studies of aggregate election results, survey data, and laboratory experiments find that when endorsements occur they typically increase the vote share of the endorsed candidate by about 1 to 5 percentage points"). Again, by Petitioner's logic media outlets could not be permitted to appear before the West Virginia Supreme Court of Appeals—or, for that matter, any elected bench—against another party while they continue their tradition of judicial candidate endorsements, lest the media outlets open the door to "bias" or its "appearance."

Evidence, however, suggests that the public does not perceive "gratitude" or an "appearance of gratitude" to be the pervasive problem that Petitioners assert. A telephone survey conducted by Rasmussen Reports in 2008 "found that 55% believe media bias is more of a problem than big campaign contributions," while 36% disagree. Rasmussen Reports, *55% Say Media Bias Bigger Problem than Campaign Cash*, Aug. 11, 2008 (available at <http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash>). The survey also found that just "22% believe it would be a good idea to ban all campaign commercials so that voters could

receive information on . . . campaign[s] only from the news media and the internet. Sixty-six percent (66%) disagree and think that . . . it's better to put up with an election-year barrage of advertising rather than rely on the news media." *Id.*

Nonetheless, Petitioners assert that "if a litigant's or attorney's campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge's recusal." Pet'rs' Br. at 27. In one sense, Petitioner's assertion merely begs the question: Does campaign support "generate[ ] an objective probability of bias"? This Court's jurisprudence has so far said no. In another sense, Petitioners' assertion has already been addressed and rejected by this Court in *White*, when it ruled that "[i]f . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process." *White*, 536 U.S. at 782. But the practice of electing judges is not a violation of due process. *See id.* at 782-83. Indeed, as Justice Kennedy has observed, states "may choose" to exercise their prerogative "to have an elected judiciary," *id.* at 794 (Kennedy, J., concurring), and that choice is wholly consistent with not only the federalism principles embodied in the U.S. Constitution, but also its commands as the "the supreme Law of the Land," U.S. CONST. art. VI., cl. 2, including the Due Process Clause of the Fourteenth Amendment.

The dead end into which Petitioners would take this Court can be found in considering what would have occurred had incumbent Justice McGraw won the election. Petitioners intimate, perhaps entirely unintentionally, that this Court must find a due

process violation in this case to correct an improper relationship between Mr. Blankenship and Justice Benjamin. But whatever recusal standard Petitioners would apply to Justice Benjamin would have to apply equally to his opponent, Justice McGraw, for in a system of winner-take-all elections, whether the $3 million was spent independently to support the judicial candidate or to oppose him matters little to the perceived impartiality of the judge. The flip side of spending for Candidate Benjamin is spending against Candidate McGraw; the flip side of "gratitude" is anger and revenge; the flip side of "benefit" is harm. Surely if Justice Benjamin's involvement creates an appearance of bias, so would that of Justice McGraw, the target of Mr. Blankenship's expenditures.

Petitioners argue that Mr. Blankenship set out to "change the composition" of the West Virginia Supreme Court that would hear Massey's appeal, which they impliedly suggest is an illegitimate goal. Pet'r's Br. at 1. But it should be apparent that under Petitioners' due process and recusal theory, Mr. Blankenship would be guaranteed success in this endeavor, as Mr. Blankenship's independent speech would have rid him of incumbent Justice Warren McGraw whether he lost or won. If this Court holds that Mr. Blankenship's past independent spending creates a due process violation of constitutional dimension where the elected judge fails to recuse, then the Blankenships of the world will always know how to rid themselves of their Justices McGraw.

B. "Bias" In An Elected Judge Cannot Be Inferred From The "Intent" Of An Independent Speaker In A Judicial Election Campaign

Petitioners allege also that we may infer from Mr. Blankenship's actions that he intended to defeat incumbent Justice McGraw. *See* Pet'rs' Br. at 29 ("Mr. Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf . . . urging doctors to [contribute] . . . because '[i]f Warren McGraw gets re-elected . . . your insurance rates will almost certainly be higher . . .'"). Petitioners also allege that "the timing of Mr. Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal." *Id.* One may conclude that Mr. Blankenship *intended* to defeat incumbent Justice McGraw. One may even conclude that Mr. Blankenship *intended* that his spending would result in the election of a judge more likely than Justice McGraw to overturn a verdict in the Massey case. This is, in essence, the "intent" of any independent speaker in any election campaign: to defeat one candidate for office and elect another. And many such speakers often "intend," or at least hope, that, after an election the policy or approach of one public official will end and that another will take its place. But "a speaker's motivation is entirely irrelevant to the question of constitutional protection." *WRTL II*, 127 S. Ct. at 2665-66.

This Court "in *Buckley* ha[s] already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates." *WRTL II*, 127 S. Ct. at 2665 (citing *Buckley*, 424 U.S. at 43-44). It

should reject a test that measures the intent of speakers acting wholly independently of an adjudicator to decide which recusal motions must be granted or rejected under the Fourteenth Amendment's Due Process Clause. Echoing the Chief Justice in *WRTL II*, a due process test "focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time" and costing the same amount would cause no bias and require no recusal for one group of litigants, but would create bias and demand recusal for another. 127 S. Ct. at 2666.

III. PETITIONERS AND THEIR *AMICI* SHOULD NOT BE PERMITTED TO USE THIS CASE AS A BACKDOOR ATTEMPT TO UNDERMINE THE COURT'S HOLDINGS IN *BUCKLEY*, *WHITE*, AND THEIR PROGENY

Simple analysis leads to an inescapable conclusion: If independent expenditures now create "bias" they must create "corruption." But such a holding would be contrary to this Court's 33-year-old holding in *Buckley*, with *Buckley* the inevitable casualty.

A. The "Bias" Standard Must Mark Activity And Interests More Personal, Substantial, Pecuniary, And Direct Than Does The "Corruption" Standard

"Corruption," as defined in *Buckley*, is the danger of *quid pro quo* arrangements. *See* 424 U.S. at 26-27. "Bias," as delineated in this Court's opinions, seems strikingly similar, as when an adjudicator finds bootleggers guilty *for* a percentage of the penalty, *see generally Tumey v. Ohio*, 273 U.S. 510 (1927); or a judge upholds the constitutionality of bad-faith claims against all insurers *for* damages in his pending bad-faith claim against his insurer, *see generally*

Aetna Life Ins. Co. v. Lavoie, 465 U.S. 813 (1986); or adjudges a man guilty *to burnish* the judge's reputation as a one-man grand juror, *see generally In re Murchison*, 349 U.S. 133 (1955); or fines a man, as adjudicator, *to burnish* the adjudicator's reputation as the municipality's revenue generator and law enforcer, *see generally Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The activity captured in the "bias" standard, however, is more acute or more insidious than the activity captured by the "corruption" standard because bias always involves a direct, personal, substantial, or pecuniary interest in reaching a conclusion against [a litigant] in the case. *See, e.g., Tumey*, 273 U.S. at 523; *accord Lavoie*, 475 U.S. at 822. Campaign contributions, however, *cannot* convey a direct, personal, or pecuniary interest in the legislative candidate. Bribery, the sale of votes for personal benefit, covers legislators and is already illegal, as the *Buckley* Court acknowledged when it held that limiting campaign contributions serves a compelling state interest that goes beyond bribery statutes. 424 U.S. at 27-28. What's more, federal campaign finance law prohibits the use of contributions for the personal benefit of any person, *see* 2 U.S.C. § 439a, and still the Court held, as a matter of constitutional law, that contributions may be limited to prevent the "corruption" of candidates and officeholders or the "appearance" of that corruption.

Independent expenditures, however, do not pose a threat of "corruption" or the "appearance of corruption"; the *Buckley* Court was clear about that. 424 U.S. at 46-47 ("independent expenditures . . . do[ ] not . . . appear to pose dangers of real or apparent corruption," and "[u]nlike contributions, . . . indepen-

dent expenditures may . . . provide little assistance to the candidate and . . . may prove counterproductive"). Therefore, this Court must square the following propositions:

> (1) If independent expenditures cannot pose a threat of "corruption or its appearance" to a legislator who won't abstain;
>
> (2) And if "corruption or its appearance" must mark activity short of conferring personal benefits on the legislator supported;
>
> (3) While "bias" in the judiciary always requires a direct, personal, pecuniary benefit;
>
> (4) Then how can independent expenditures cause "bias or its appearance" in a judge who will not recuse?

B. If The Court Finds "Bias" In This Case, It Must Of Necessity Reconsider Its Opinions In *Buckley* And *White*

The Court should not pass quickly over these propositions and the resulting question. If this Court rules that independent expenditures can create "bias" or its "appearance" in a judge who will not recuse, then the edifice this Court has painstakingly erected to shelter independent political speakers from the threat of government-imposed limitations would collapse. For if independent expenditures would create the greater, more direct, personal, substantial, pecuniary benefit necessary to a finding of "bias," then independent expenditures must always create the lesser potential benefit necessary to a finding of "cor-

ruption," leading inexorably to the overruling of *Buckley and MCFL.*[10]

Furthermore, this Court should not be lured into thinking that the difference between the judicial and legislative functions permits a finding that independent expenditures that cannot create a threat of *quid pro quo* in a legislator *must* create a direct, personal, substantial, pecuniary interest in a judge. While it is true that a judge has absolutely no interest in the outcome of the dispute between the parties before the bench, and that a legislator is supposed to enact policy for constituents and the public at large, the role of independent expenditures in judicial and legislative campaigns is the same. They are both speech—indeed, constitutionally protected speech—within candidate elections. *See, e.g., White*, 536 U.S. at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."); *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497; *Buckley*, 424 U.S. at 45-51.

While this Court has never "assert[ed] or impli[ed] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," *White*, 536 U.S. at 783, this Court must recognize that if the mere existence of an independent expenditure campaign in a judicial election creates an unconstitutional threat of "bias" or its

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[10] Moreover, should independent expenditures become limited or prohibited on such a basis, *Buckley's* holding regarding limits on contributions to candidate campaigns must be re-examined, for that holding relied in part on the idea that First Amendment burdens were minimized because speakers could still make independent expenditures. 424 U.S. at 28.

"appearance" in a judge who rejects recusal, then inferior courts will, over time, infer that the mere existence of independent expenditures in legislative elections must create the threat of "corruption" or its "appearance" in legislators who won't abstain. This Court should avoid the confusion and the unavoidable weakening of protections for core independent political speech that will inevitably result from such a holding under the Fourteenth Amendment's Due Process Clause.

Amicus respectfully suggests that for some of the *amici* supporting Petitioners, this case is less about due process than it is about getting the Court to overrule *sub rosa Buckley's* protections for independent expenditures in election campaigns[11] despite this Court's repeated rejection of their overtures in *Randall v. Sorrell,* 548 U.S. 230 (2006) (expenditure lim-

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[11] Such *amici* have participated in most any and every effort to impose or further campaign expenditure and/or contribution limits for independent speakers. *See, e.g., Randall v. Sorrell,* 548 U.S. 230 (2006) (Brennan Center for Justice Amicus Br.) (Campaign Legal Center, Democracy 21, and Public Citizen Amicus Br.); *Federal Election Comm'n v. Beaumont,* 539 U.S. 146 (2003) (Public Citizen, Common Cause, Democracy 21, Campaign and Media Legal Center, and Center for Responsive Politics Amicus Br.); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose,* 546 F.3d 1087 (9th Cir. 2008) (Campaign Legal Center Amicus Br.); *Duke v. Leake,* 524 F.3d 427 (4th Cir. 2008) (Campaign Legal Center Amicus Br.); *North Carolina Right to Life, Inc. v. Leake,* 482 F. Supp. 2d 686 (E.D.N.C. 2007) (Campaign Legal Center and Democracy 21 Amicus Br.), *aff'd in part and rev'd in part,* 525 F.3d 274 (4th Cir. 2008); *SpeechNow.org v. Fed. Election Comm'n,* 567 F. Supp. 2d 70 (D.D.C. 2008) (Campaign Legal Center and Democracy 21 Amicus Br.). *See also* Brennan Center for Justice, *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics* (2000).

its on candidate speech unconstitutional); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (contribution limits on independent expenditures funded by individuals unconstitutional); *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) (plurality op. and Blackmun, J., concurring) (same); back to *Buckley v. Valeo*, 424 U.S. 1 (1976) (expenditure limits on speech funded by individuals unconstitutional).

These *amici* now say to this Court, almost breezily, that "*[d]istinctions* between contributions and expenditures have only a marginal salience when it comes to the fundamental fairness concerns at the core of due process," and that "[t]his case . . . allows the Court to resolve the due process issues *without any need for inquiry* into the permissibility of restrictions on expenditures supporting a candidate vis-à-vis contributions to a candidate." Brief of *Amicus Curiae* The Brennan Center for Justice at NYU School of Law, The Campaign Legal Center, and The Reform Institute In Support of Petitioners, at 23 (emphasis added). Enter the Trojan horse.

IV. West Virginia's Remedy Is To Renounce Judicial Elections Or Erect "Recusal Standards More Rigorous Than Due Process Requires"

If this Court holds that independent expenditures in judicial elections create a violation of due process where the targeted candidate—or his opponent—later fails to recuse, it will signal that recusal must come, not because of a rigorous judicial canon designed to prevent an unwanted appearance, but as a matter of constitutional law. It would create an untenable and unnecessary conflict of constitutional

rights and jurisprudence. One citizen's right to due process, another's right to free speech through independent expenditures, and a State's choice of judicial elections over judicial appointments could not exist together. In time, either the Due Process right or the First Amendment right would have to go, or the well-established prerogative of States to elect their judges would have to give way.[12]

The finding of a due process violation in this case will invite some State, somewhere, quickly to test the limits of the finding with legislation banning or limiting independent expenditures in judicial elections. Foes of independent speech would then be in the catbird seat, and speech defenders might wish this Court had this case back.[13] Speech defenders would seek to save independent expenditures from limita-

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[12] Due process rights would not be the casualty; nothing is more fundamental to our system of government than the due process of law. *See New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, presupposes a functioning judiciary"). Nor is it likely that judicial elections would be the casualty. The casualty will be the First Amendment right, in the form of fully protected independent expenditures in judicial elections and, by an inevitable extension of logic, in elections generally.

[13] This Court harbors no illusions that test cases may come and come quickly, even from statehouses. *See, e.g., Landell v. Sorrell*, 382 F.3d 91, 156 n.2 (2d Cir. 2002) (Winter, J., dissenting) ("The desire to challenge *Buckley* . . . is exemplified by an astonishing statement of Vermont's Secretary of State . . . [in which] she cautioned against any amendment . . . that would . . . 'frustrate the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*.'"), *rev'd sub nom, Randall v. Sorrell*, 548 U.S. 230 (2006); *see also Landell v. Sorrell*, 406 F.3d 159, 177 (2d Cir. 2005) (Jacobs, J., joined by Walker, Cabranes & Wesley, JJ., disenting from denial of rehearing en banc) (same).

tions, perhaps by arguing that the narrowly tailored option is in rigorous recusal canons, not in bans or limits on independent expenditure campaigns. But that assertion would surely ring hollow if this Court had already held that a litigant's independent expenditures in a past judicial election causes "bias," its "probability," or its "appearance," that results in a due process deprivation.

Better for this Court to avoid such a conflict by determining now that the State's remedy (should it want one) against an unwanted, but not unconstitutional, appearance is in recusal canons more rigorous than due process requires, and thus take a preemptive step toward the preservation of independent expenditures in elections. There need not be a due process violation for West Virginia to have a remedy. *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Court need not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (citations omitted). West Virginia's remedy[14] is provided in the

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[14] W. VA. CODE § 3-8-12(g) prohibits contributions in excess of $1,000 to a so-called 527 organization operating in West Virginia. This Court should neither suggest that provision to be the remedy here, nor consider that provision's constitutionality without development and briefing in another case where the issues and questions involved have been fully aired. Indeed, a recent decision by a district court in West Virginia calls that statutory provision into question, *see Center for Individual Freedom v. Ireland*, Nos. 1:08-CV-00190 & 1:08-CV-01133, 2008 U.S. Dist. LEXIS 83856 (S.D. W. Va. 2008), and this Court's own precedents suggest the same, *see, e.g., WRTL II*, 127 S. Ct. at 2671-73 (speech not the functional equivalent of express advocacy is not regulable, despite the nature of the organization speaking); *Buckley*, 424 U.S. at 45-48 (independent expenditures pose no threat of corruption or its appearance); *Citizens Against*

words of Justice Kennedy. It may either appoint its judges or adopt recusal standards *more rigorous* than the Fourteenth Amendment's Due Process Clause *requires*[15]:

> [West Virginia] may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. *It may adopt recusal standards more rigorous than due process requires*, and censure judges who violate those standards. *What [West Virginia] may not do*, however, is censor what the people hear as they undertake to decide for

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Rent Control v. City of Berkeley, 454 U.S. 290, 298-300 (1981) (limitations on contributions to issue advocates unconstitutional).

[15] Respondents, in a brief opposing *certiorari*, mentioned that if, under operation of a rigorous recusal canon, "lawyers and litigants knew that their contributions or [independent] expenditures might force a judge's recusal, then they could be chilled from exercising their First Amendment rights." Brief for Resp'ts in Opp'n at 22. But this is incorrect. The interest of the citizen who runs independent expenditures in judicial elections is in convincing his fellow citizens of the better judge(s) to sit on the bench in his state, not in having a particular judge hear his case, just as a judge has no right to hear a particular case. Indeed, a litigant possesses no right to have his case heard by a particular judge, *see Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984) (collecting cases); *see also* 46 AM. JUR. 2d Judges § 25 ("litigants have no right to have, or not have, any particular judge of a court hear their cause"), and a judge possesses no right to hear or decide a particular case unless it is assigned to him pursuant to the standard procedures used in his jurisdiction. As this Court said in passing over 80 years ago, "[i]n [being recused from a case] there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in particular case; of what concern to other parties to have him so preside?" *Berger v. United States*, 255 U.S. 22, 36 (1921).

> themselves which candidate is most likely to be an exemplary judicial officer.

White, 539 U.S. at 794 (Kennedy, J., concurring) (emphasis added). "The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Id.* at 795. Likewise, the State cannot opt for an elected judiciary and then assert that judicial impartiality can occur only in the absence of speech. Petitioners' argument, if successful, would undercut longstanding and recently reaffirmed holdings in campaign finance law—holdings that cannot be cabined to judicial elections, thus undermining speech in elections generally.

CONCLUSION

For the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

STEPHEN M. HOERSTING
Counsel of Record
BRADLEY A. SMITH
REID ALAN COX
CENTER FOR COMPETITIVE POLITICS
124 S. West Street
Suite 201
Alexandria, VA 22314
(703) 894-6800

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Michael T. Liburdi
PERKINS COIE
BROWN & BAIN P.A.
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 351-8000
mliburdi@perkinscoie.com

Karl J. Sandstrom
Counsel of Record
PERKINS COIE LLP
607 14th Street N.W.
Washington, D.C. 20005
(202) 628-6600
ksandstrom@perkinscoie.com

Counsel for *Amici Curiae*

49GYL7

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STATEMENT OF INTEREST

The Center for Political Accountability ("CPA") and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania ("The Zicklin Center") submit this brief as *amici curiae* in support of the Petitioners.[1]

CPA is a non-profit, non-partisan organization dedicated to ensuring transparency and accountability of corporate political spending for the benefit of shareholders, the public, and the political process. CPA seeks to create a business environment that promotes ethical behavior. Critical to its success are laws and regulations that foster rather than impede ethical decision-making. Since CPA was founded in 2003, it has worked with shareholders and companies to enable companies to pursue their political interests openly and responsibly. Drawing from the published practices of leading companies, CPA developed a model code for corporate political activity. Major corporations including Intel, Merck, and Dell subsequently modeled their codes on CPA's.

CPA also promotes corporate disclosure and oversight of company political spending. As a result of its efforts, sixty leading public companies, including forty S&P 100 companies, have made

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[1] CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

political disclosure and oversight an essential element of their political programs.

CPA produces reports on issues related to corporate political activity and has conducted surveys that have examined the attitudes of directors and shareholders toward political spending. Those surveys have demonstrated broad support for transparency and accountability and, more generally, a commitment to the highest ethical standards in corporate political involvement. The business community understands well the reputational and legal risks that irresponsible political behavior poses.

The Zicklin Center, established in 1997, sponsors and disseminates leading research on business ethics and corporate social responsibility. It provides students, educators, business leaders, and policymakers with tools to meet the ethical challenges that arise in complex business transactions. The Zicklin Center supports research that examines organizational incentives and disincentives to ethical business practices. Among The Zicklin Center's primary concerns are conflicts of interest that compromise independent judgment or create the appearance of such a compromise. One lesson that can be drawn from its work is that a society cannot expect its businesses to behave ethically if it does not create conditions where ethical behavior, if not rewarded, is at least not punished in the marketplace.

CPA and The Zicklin Center share concerns about corporate officers' use of their firms' resources to influence judicial elections. At the very least, significant political spending by corporations creates

the appearance of a disparity of justice that disadvantages individuals and companies lacking the means to contribute to judicial campaigns. Corporate expenditures may also unleash an arms race of political spending and lead to a "pay-to-play" environment, where judicial decisions appear to be more influenced by the money spent on clever political advertisements than by the merits of a case.

SUMMARY OF ARGUMENT

When a judge of a state's highest court casts the deciding vote in favor of a party whose chief executive officer spent millions of dollars supporting his election campaign, the opposing parties and observers should rightfully question whether the judge was impartial and whether all parties received due process. Under these circumstances, the Fourteenth Amendment's Due Process Clause demands that judges recuse themselves from cases involving persons or companies that supported their election through substantial campaign spending.

There is no effective legal constraint on the amount or source of money that a corporation or its directors, officers, or major shareholders may spend to influence the election of candidates for state judicial office. Many states prohibit direct corporate contributions to state and local candidates. But even where direct corporate contributions are prohibited, avenues remain for corporate money to find its way into the political process in the form of candidate-specific issue advocacy and independent expenditures that are protected by the First Amendment. Aware of this, corporate officers, directors, and major shareholders may rationally

conclude that it is in their company's best interests to spend large sums of money to influence a judicial election.

The escalation of judicial campaign spending traps business leaders into a classic "prisoner's dilemma." For ethical and financial reasons, most corporations would prefer to avoid spending money on an election that involves candidates for a seat on a court where it has a matter pending. An ethically-centered company would seek to avoid being drawn into the sort of judicial politics that Massey Coal board chairman, CEO, and president Don L. Blankenship so aggressively waged in 2004 to elect Justice Brent Benjamin to the West Virginia Supreme Court of Appeals. In today's election environment, however, a corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear its case. Increasingly, corporations feel compelled to support their own candidates to guard against an adverse judgment that damages the company and its shareholders.

Mandatory recusal is necessary to stanch this campaign spending arms race and maintain the integrity of the judicial system. The economy and the rule of law cannot thrive without robust safeguards of judicial impartiality. Mandatory recusal of judges who receive substantial support from the parties before them would ensure minimal due process while enabling individuals and corporations to freely exercise their First Amendment rights to engage in political speech.

ARGUMENT

I. There is No Effective Legal Constraint on Corporate Spending in Support of Judicial Candidates

In states that elect judges, political campaign contribution rules are set by state campaign finance laws. For over a century, Congress and many state governments have banned direct corporate contributions to political candidates to prevent large corporate money war chests from being funneled to candidates in a manner that corrupts or creates an appearance of corruption. *See Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 154 (2003).

At first glance, state law restrictions on corporate spending may seem like an effective means for protecting the integrity of judicial elections. Indeed, in the present case, West Virginia law prohibited Massey Coal from contributing corporate treasury funds to Justice Benjamin's 2004 campaign and limited Mr. Blankenship's personal contribution. *See* W. Va. Stat. § 3-8-8(a). But recent cases, including this one, illustrate that companies like Massey Coal have many other avenues to spend as much money as they can budget to influence judicial elections.

A. Issue Advocacy

One avenue for corporate political expenditures is candidate-centric advocacy on public issues, commonly referred to as "issue advocacy." In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized a constitutional separation between issue advocacy and express advocacy, the latter being speech that calls for the "election or defeat" of a

clearly identified candidate for public office. *Id.* at 43-44 & n.52. Speech that urges voters to vote for or against a particular candidate through such calls for action as "vote for," "support," "elect," or "defeat," or by using the functional equivalent of these words, constitutes express advocacy. *Id.*; *see also Federal Election Comm'n v. Wis. Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL*"). A corporation's right to speak on matters of public importance must yield only to the government's compelling interest in eliminating corruption or the appearance of corruption in the political process, which justifies prohibitions on corporations using their treasury funds in political campaigns. *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). This compelling interest justifies regulatory limits on contributions to political campaigns, which this Court has described as "a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21, 25-29.

But when it comes to advocating positions on public issues, this Court has found that the First Amendment protects expression paid for by corporate treasury funds just as it does for individuals. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978). Corporate speech advocating positions on such public issues as taxes, welfare reform, and education is included in that "type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777 (footnote omitted).

This Court recently reaffirmed this principle in *WRTL* when it held that Section 203 of the Bipartisan Campaign Reform Act ("BCRA") did not apply to certain television advertisements produced by a non-profit corporation. 127 S. Ct. at 2670. The Court held that the advertisements at issue, which asked viewers to urge Wisconsin Senators Russ Feingold and Herb Kohl to oppose Senate filibusters of federal court nominees, could not be regulated because they focused on legislative issues and lacked the "indicia of express advocacy." *Id.* at 2667.

WRTL teaches that a communication that "is susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" falls in the issue advocacy category. *Id.* at 2667. Communications that might arguably be construed as supporting or opposing a judicial candidate might not fall in the regulated express advocacy category if, at the same time, the communications urge support or opposition to public issues. *See Buckley*, 424 U.S. at 42 ("Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."). This is so even when the communication references a candidate and casts that candidate in a favorable or unfavorable light. *See WRTL*, 127 S. Ct. at 2660.

WRTL also invalidates restrictions on the timing of issue advertising. Section 203 of BCRA prohibited corporations and unions from engaging in electioneering communications, defined as any broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" and is made within sixty days before a general

election, special, or runoff election or thirty days before a primary. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). Although BCRA barred candidate-specific corporate broadcast advertising only during a limited period immediately before an election, that fact was insufficient to sustain the ban when applied to issue advocacy. The Court held that the prohibition, which included communications that merely mentioned a candidate, was unconstitutional when applied to the genuine issue advocacy in which WRTL was engaged. *WRTL*, 127 S. Ct. at 2663, 2673.

After *WRTL*, corporations, their directors, officers, and shareholders may spend unlimited amounts of money to fund broadcast, print, internet, and other advertisements supporting or criticizing issues taken on by courts and judges. Blanket prohibitions on such spending are unconstitutional. These advertisements may associate a candidate with positions on issues and may be designed to influence voter attitudes toward that candidate. Nevertheless, an advertisement may not be regulated merely because of its author's intentions or its likely effect. A company's decision to spend in a judicial election thus becomes a business decision rather than a legal question. So long as the corporation carefully avoids express advocacy, its activity is protected by the First Amendment.

B. Independent Expenditures

Independent expenditures provide a second avenue for spending in judicial elections. An independent expenditure advocates the election or defeat of a candidate without the control of or coordination with a candidate, his or her campaign

committee or agents, or a political party or its agents. *Buckley*, 424 U.S. at 46; *see, e.g.*, 2 U.S.C. § 431(17) (defining "independent expenditure" under federal campaign finance law).

Governments may prohibit corporations from making independent expenditures, but they cannot limit the amount of money an individual spends to support or oppose a political candidate if the expenditures are made without coordinating with a political campaign, committee, or party. *Buckley*, 424 U.S. at 20-21. While the Court has described *contributions* as "general expression[s] of support for the candidate" that may be regulated, independent spending by individuals constitutes expressive activity protected by the First Amendment. *Id.* at 19-21 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 300-01 (1981) (Rehnquist, J., concurring) ("[I]n this situation there is no state interest which could justify a limitation on the exercise of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.").

As a result, a corporate officer or shareholder may engage in independent expenditures supporting or opposing judicial candidates, the only limitation being the amount of money he or she wishes to spend. After surveying the field of judicial candidates, one could decide which represent an

opportunity for a reasonable return on investment and which could potentially stifle the company's business goals. The officer or shareholder could then fund direct mail pieces, television, radio and newspaper advertisements, attack ads, "push polls," and other electioneering activities so long as they are uncoordinated. Such expenditures have the unmistakable intent of influencing the public's opinion of the candidates.

C. No Limitation on the Content of Political Expenditures

The content of speech in judicial elections, whether funded constitutionally through issue advocacy or independent expenditures, cannot be regulated by the government. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). "[C]ontent-based restrictions on political speech are 'expressly and positively forbidden by' the First Amendment." *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964)). This longstanding rule of constitutional law provides corporations and individuals with a guarantee that the government cannot censor the message conveyed about public issues and judicial candidates.

II. A Corporation May Rationally Decide Political Spending Serves Its Interests

Aware of this legal landscape, a corporation, its officers, directors, or major shareholders could make a calculated business decision to spend money to influence the results of a judicial election. Indeed, a corporation and its agents may owe duties and

obligations to shareholders to support candidates whose judicial philosophies represent the company's best interests in pending or anticipated litigation. *See, e.g., Miller v. U.S. Foodservice, Inc.*, 361 F. Supp. 2d 470, 477 (D. Md. 2005) ("The duty of care requires that corporate officers and directors 'exercise an informed business judgment' to make decisions reasonably determined to be in the best interests of the corporation and its shareholders.") (citation omitted); *see also* Rev. Model Bus. Corp. Act § 8.42(a)(3) (prescribing that a corporate officer must act "in a manner the officer reasonably believes to be in the best interest of the corporation"). That judicial candidates have a First Amendment right to announce their position on issues that may come before the court allows corporate officers to evaluate which candidates would best suit the company's interests. *See White*, 536 U.S. at 788.

The actions taken by Mr. Blankenship well illustrate the business calculation. Petitioners won a $50 million jury verdict against Massey Coal in August 2002. Anticipating a petition for review to the five-member West Virginia Supreme Court of Appeals, Mr. Blankenship sought to install a new justice in the 2004 election.

Mr. Blankenship undisputedly spent nearly $3 million on Justice Benjamin's election to the West Virginia Supreme Court of Appeals. [Pet. 7] By Respondents' own count, Mr. Blankenship spent a total of $2,988,207, consisting of a $1,000 donation to Justice Benjamin's campaign, $517,707 in independent expenditures, and $2,460,500 through "And For the Sake of the Kids," an advocacy group that is apparently registered as a Section 527

organization.[2] [Opp. 4] Mr. Blankenship's independent expenditures and Section 527 contributions were used both to support Justice Benjamin's candidacy and to attack the incumbent Justice, Warren McGraw. [*Id.*] One advertisement appealed to voters' basic fears by describing Justice McGraw as a "radical" who allowed "a child rapist [to] go free . . . [t]o work in our schools[.]" [Pet. 7] Mr. Blankenship apparently wrote letters to potential contributors that "are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee." [*Id.* at 8]

Justice Benjamin won the 2004 election and took office in 2005. Mr. Blankenship soon realized a return on his investment. Justice Benjamin refused repeated requests that he recuse himself and supplied the deciding vote that overturned the $50 million verdict against Massey Coal.

III. Spending In a Judicial Election by Parties With a Matter Before the Court Presents a Classic "Prisoner's Dilemma"

Many corporations would prefer not to play the judicial sweepstakes, despite the possible payoff. These companies elevate corporate ethics, shareholder values, and their public image above the short-term gains from spending on judiciary candidates. Survey evidence reveals that most business leaders believe that disproportionately large campaign contributions influence judges'

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[2] In West Virginia, a person may contribute to a candidate's campaign committee up to $1,000 for the primary election and another $1,000 for the general. W. Va. Code § 3-8-12(f).

decisions and create an unacceptable appearance of such influence. Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3-4 (2007).

The proliferation of big-money judicial contests[3] ensnares conscientious business leaders in a classic "prisoner's dilemma." In this game theory problem, prisoners A and B stand accused of the same crime. A and B will both be better off if neither confesses. But A will be individually worse off if B alone confesses, and vice versa. The outcome is that both prisoners confess, even though this makes them worse off than if both had remained silent.

Similarly, corporations A and B are rivals in "bet the company" litigation. Both would prefer to avoid the ethical maelstrom and cost of supporting a candidate for the court in which their case is or will be pending. The optimal outcome is for neither to spend on the election. Corporation A, however, cannot help but worry that it will incur great financial losses if Corporation B supports a candidate and Corporation A does not. Corporation B faces the same dilemma. Each rationally assumes that the other will spend and, therefore that it must also spend. As a result, both expend substantial resources on the election, leaving them (and their shareholders and society at large) worse off.

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[3] In the four most recent election cycles, judicial candidates raised nearly twice the amount raised in the four election cycles preceding them. James Sample et al., *The New Politics of Judicial Elections* 15 (2006).

This simple hypothetical demonstrates the plight of the reluctant corporate spender. In a judicial election system that is increasingly pay-to-play, everyone must pay, whether they want to or not. The prisoner's dilemma pits the corporation's long-term commitment to sound ethical and financial management against its short-term obligation to protect shareholders from a harmful adverse judgment.

Mr. Blankenship's successful effort to install Justice Benjamin demonstrates what a well-heeled, determined supporter can achieve through the judicial election process. Justice Benjamin may have no actual bias in favor of Massey Coal, as he insists. But a judge who casts the deciding vote to overturn a $50 million jury verdict against a corporation whose CEO spent $3 million in support of his campaign inevitably creates a perception of bias.

That perception alone is sufficient to ignite a judicial campaign spending arms race. More than sixty percent of business leaders surveyed by Zogby expressed concern that the "rising cost of judicial elections around the country is forcing businesses to spend more of their money contributing to judicial campaigns." Zogby Int'l, *supra*, at 5. Moreover, mounting empirical evidence confirms that the connection between judicial campaign spending and judicial outcomes is real, not just perceived.[4] In a legal environment devoid of effective restraints on

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[4] *See* TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT 10 (2001), at http://www.tpj.org/docs/2001/04/reports/paytoplay/; Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

such undue corporate influence, even reluctant corporations may feel compelled to support their own judicial candidates to protect shareholders' interests.

As spending escalates, judicial elections more and more appear to be a tool of the wealthy and powerful, casting doubt on the impartiality and legitimacy of the judicial system overall. "A judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law. If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced." WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 129 (Oxford Univ. Press 2002).[5]

The courts cannot purport to guarantee due process in a pay-to-play environment. The legal system must promote ethical business behavior with respect to campaign spending, not undermine it by rewarding firms that secure their short-term interests by influencing elections.

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[5] *See also* Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* 3 (World Bank Technical Paper No. 319, 1996), cited in Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 721 n.21 (2004) ("[R]eporting that most Latin American respondents in a multi-national survey consider the judicial system to be among the top 10 restraints to private sector development.").

IV. Mandatory Recusal Enables a Corporation to Pursue Both Its Public and Private Interests Ethically

Mandating recusal in appropriate circumstances would simultaneously facilitate ethical business behavior and safeguard First Amendment activity. The business community values an impartial judiciary and indeed depends upon it to sustain a stable legal environment in which capitalism can thrive. "The degree of judicial independence is correlated with economic growth. Better performing courts have been shown to lead to more developed credit markets. A stronger judiciary is associated with more rapid growth of small firms as well as with larger firms in the economy." Kenneth W. Dam, *The Judiciary and Economic Development* 1 (The Univ. of Chicago John M. Olin Law & Econ. Working Paper No. 287, 2006) (footnote omitted).

Corporate campaign spending to address public issues and corporate officers' individual spending to opine on candidates' qualifications are legitimate exercises of First Amendment rights that need not conflict with impartial justice. Yet the current system puts these interests in conflict. Four in five American business leaders express concern that "financial contributions have a major influence on decisions rendered by judges." Zogby Int'l, *supra*, at 3-4. These leaders are nearly unanimous in the opinion that judges should recuse themselves from cases involving contributors. *Id.* at 6.

A constitutional standard for mandatory recusal, therefore, facilitates First Amendment activity

without rewarding campaign spending aimed at subverting judicial independence.[6]

Wise executives understand that "[t]he power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *White*, 536 U.S. at 793 (Kennedy, J., concurring). Mandatory recusal would serve due process by disentangling a corporation's public interests (supporting qualified judges and expressing its views on matters of public import) from its private ones (achieving a favorable outcome in a particular court case). Corporations and officers would be better able to pursue ethically their interests in elections because they could spend freely without the expectation of a quid pro quo.

Mandatory recusal would also avoid the chilling effects associated with regulating political speech, of which the Court has long warned. *See, e.g., Buckley*, 424 U.S. at 16-19. The establishment of a due process floor for recusal would respect the right of a corporation to engage in political speech without diminishing the due process rights of other parties.

A clear recusal standard would nullify the advantages of spending to influence judicial

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[6] Parties do not have a cognizable interest in hand-picking a judge to hear and decide their case, including one that has benefited from their campaign spending. Likewise, parties have no legitimate interest in demanding a particular judge based on other individual factors, such as a willingness to grant dispositive motions, management of discovery, and scrutiny of the qualifications of expert witnesses. *See Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir. 2008).

outcomes. The minority of corporations that lack compunction about "buying elections" will lose the incentive to do so, ensuring that the majority of corporations are not punished by the market for behaving ethically. "Surely special interests would be less inclined to invest so heavily in judicial elections if they knew the recipients of their largess likely would be barred from sitting on their cases." Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'* N.Y. TIMES, April 15, 2008, at A22.

Due process accordingly requires that state courts establish a procedure for elected judges to follow when a litigant raises campaign spending as a basis for recusal. The judge who is being asked to recuse him or herself should have the first opportunity to rule on a recusal motion, but should not be the sole and final arbiter. An effective recusal process also requires that denied motions be referred to a disinterested reviewer, such as a retired judge, a board, or some other tribunal, for *de novo* review. Automatic review will correct wrongfully-denied motions, and, more importantly, encourage judges to grant meritorious motions in the first instance rather than face reversal by an impartial authority.

At a minimum, a judge and any reviewing body would need to assess the following factors when considering a recusal motion:

(1) Did an individual party or an officer, director, or major shareholder of a corporate party directly or indirectly contribute or spend a significant sum of money in connection with the judge's election?

(2) If the spending was in the form of advertising, did the advertising expressly refer to the judge or the judge's opponent?

(3) Was the sum spent significant in comparison to the total amount spent on the election?

(4) Was the nature and timing of the expenditure such that it would likely have an impact on the election?

(5) Was the race contested?[7]

(6) Did the party have a matter pending or reasonably anticipate having a particular matter before the court at the time of the expenditure?

When an analysis of these factors would lead a reasonable person to conclude that the spending would give rise to bias or the appearance of bias, due process requires that the judge recuse him or herself. Moreover, a process that thoughtfully considers these factors would relieve federal courts of the need to supervise state court judgments for potential campaign-related bias except in the most extraordinary circumstances.

It is the absence of such consideration that brings this matter before this Court. All these factors were present in Massey Coal's matter before the West Virginia Supreme Court of Appeals. A corporate

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[7] Campaign spending may still create bias or the appearance of bias in an uncontested election or a retention election in merit-based selection jurisdictions. Judges running unopposed can still benefit from independent spending by seeking to affect the outcome of current or anticipated litigation. Due process requires consideration of the other factors even when the judge ran in an uncontested election.

officer accounted for sixty percent of the winning candidate's total expenditures in a hotly contested judicial campaign, shortly before the officer's company appealed a $50 million jury verdict against it. Justice Benjamin nonetheless refused to recuse himself – not once, but twice.

Justice Benjamin's decision to participate in the Massey Coal appeal tainted the public's perception of him as a judge and its perception of the West Virginia Supreme Court of Appeals as an institution of justice. Requiring mandatory recusal where an officer of a corporate party has spent a substantial amount of money to elect a member of the state's judiciary – the state's court of last resort, no less – is the only way to ensure due process for all litigants and to maintain public confidence in the judicial system. A clear, practical due process standard will enable companies to act ethically without sacrificing their right to speak on important public issues.

CONCLUSION

The Court should grant the relief requested by Petitioners.

Respectfully submitted,

Michael T. Liburdi
PERKINS COIE
BROWN & BAIN P.A.
2901 N. Central Avenue
Phoenix, Arizona 85012

Karl J. Sandstrom
Counsel of Record
PERKINS COIE LLP
607 14th Street N.W.
Washington, D.C. 20005

Counsel for *Amici Curiae* the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research

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AMICUS CURIAE BRIEF

No. 08-22

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Petitioners,

—v.—

A.T. MASSEY COAL COMPANY, INC., ET. AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

DANIEL F. KOLB
Counsel of Record
EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH M. EGAN
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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BRIEF OF AMICI CURIAE THE COMMITTEE FOR ECONOMIC DEVELOPMENT, INTEL CORPORATION, LOCKHEED MARTIN CORPORATION, PEPSICO, WAL-MART STORES, INC., DEFENSE TRIAL COUNSEL OF INDIANA, THE ILLINOIS ASSOCIATION OF DEFENSE COUNSEL, AND TRANSPARENCY INTERNATIONAL – USA IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

This Amici Curiae brief in support of Petitioners is filed on behalf of corporations and organizations committed to maintaining public confidence in the judicial system in order to promote economic growth and development.

Amicus Curiae the Committee for Economic Development ("CED") is an independent, nonpartisan, trustee-directed organization of business leaders dedicated to policy research on economic and social issues and the implementation of its recommendations by the public and private sectors. CED's trustees include leaders of America's largest corporations and business organizations—companies that operate around the country and the world. Throughout its 66-year history, CED has addressed national issues that promote economic growth and development in the United States.

Amicus Curiae Intel Corporation is the world's largest semiconductor manufacturer. Intel and its founders pioneered the key technologies that have enabled the digital revolution, including the integrated circuit, computer memory, and the microprocessor.

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37, Amici Curiae state that counsel for Amici authored this brief in its entirety. No person or entity other than Amici, their supporting organizations, and their counsel made a monetary contribution to the preparation of this brief.

Amicus Curiae Lockheed Martin Corporation is a global security company that employs about 140,000 people worldwide and is principally engaged in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services.

Amicus Curiae PepsiCo is one of the largest convenient foods and beverages companies in the world, with more than 180,000 employees. From beverages to snacks, PepsiCo offers consumers more than 600 product choices. PepsiCo's commitment to sustainable growth is focused on generating healthy financial returns while giving back to communities the company serves.

Amicus Curiae Wal-Mart Stores, Inc. operates Walmart discount stores, supercenters, Neighborhood Markets and Sam's Club locations in the United States. Wal-Mart Stores, Inc. also operates in Argentina, Brazil, Canada, China, Costa Rica, El Salvador, Guatemala, Honduras, Japan, Mexico, Nicaragua, Puerto Rico, and the United Kingdom and, through a joint venture, in India.

Amicus Curiae Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers who defend individual and corporate clients in civil litigation. DTCI's primary mission is to assist and support its members by advocating and providing a voice of reason in government, the courts, the legal profession, and the community at large. Recognizing the impact that legal disputes have on businesses and on society as a whole, DTCI seeks to promote the ra-

tional and efficient administration of justice while recognizing the duty to represent clients zealously.

Amicus Curiae the Illinois Association of Defense Counsel ("IDC") is a voluntary organization of independent lawyers whose experience includes substantial tort practice generally for the defense. IDC is a nonprofit organization with approximately 1,000 members drawn from nearly every county in Illinois. It and its many members believe that they have a constructive role to play in the development of our system of justice and that their interests may be greatly affected by this Court's determination of the important issues in this appeal.

Amicus Curiae Transparency International-USA ("TI-USA") is the U.S. chapter of Transparency International ("TI"), an independent, nonpartisan, nonprofit organization working to combat corruption and increase accountability in government and international business. Judicial integrity is a longstanding TI priority, reflected in a comprehensive report on "Corruption in Judicial Systems" issued in 2007 and the reform efforts of its more than 80 national chapters around the world. TI-USA believes that public confidence in the fairness and integrity of judicial systems is critical to maintaining a strong rule of law at home and in the many jurisdictions abroad that look to U.S. practice as a model.

Amici believe that public confidence in judicial integrity and in the evenhandedness of the judicial system is a critical element of America's stable, prosperous business climate. As Justice Story wrote, "[n]o man can be insensible to the value, in promoting

credit, of the belief of there being a prompt, efficient, and impartial administration of justice . . . ." 3 J. Story, *Commentaries on the Constitution of the United States* § 1685, at 564 (1833). Essential to public confidence in the judiciary is the assurance that justice is not for sale and that legal disputes will be resolved by fair and impartial judicial officers.

Where, as here, a party or its representative has made disproportionately large campaign contributions to a judge, that judge's impartiality in a case involving the contributor is cast into doubt. A decision by that judge to hear such a case has far-reaching consequences because it erodes public confidence that the case has been decided fairly, and, accordingly, that future cases will be decided fairly. Recusal in a case such as this is essential, both to guarantee due process and to preserve confidence in the judiciary. Because Justice Benjamin's refusal to recuse himself under the circumstances undermines confidence in the result the court reached, Amici strongly urge the Court to vacate the decision below.

SUMMARY OF ARGUMENT

Due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself on account of the campaign support he received from the CEO of Respondent A.T. Massey Coal Company ("Massey"). By not recusing himself from the appeal of a $50 million jury verdict against Massey—after he received over $3 million in post-verdict, pre-appeal campaign support from Massey's CEO—Justice Benjamin created an appearance of bias that would diminish the integrity of the judicial process in

the eyes of any reasonable person. In light of the appearance of bias, Petitioners cannot be said to have received due process.

It is imperative to the preservation of public confidence in the elected judiciary that the Court hold that such an appearance of bias is not consistent with due process. Such confidence in the judiciary is of particular value to those engaged in commerce, who rely on evenhanded justice to make informed financial and investment decisions. Survey data indicate that business executives, as well as judges themselves and voters at large, believe that campaign contributions influence judicial decisionmaking. In the face of ever more expensive and politicized judicial elections, there is a need to signal to businesses and the general public that judicial decisions cannot be bought and sold, and reversal of the judgment below based on Justice Benjamin's failure to recuse himself would accomplish that.

A holding that Justice Benjamin's participation in Massey's appeal violated due process would, in itself, place no limits on otherwise appropriate contributions. Nor would it restrict the rights of contributors and candidates to participate vigorously in campaigns. Rather, it would preserve the integrity of both the judiciary and judicial elections. It also would allow campaign contributions to continue without undermining confidence in the judiciary.

ARGUMENT

I. CLEARLY ESTABLISHING THAT DUE PROCESS REQUIRES RECUSAL OF A JUDGE WHO HAS RECEIVED OUTSIZED CAMPAIGN CONTRIBUTIONS FROM A PARTY BEFORE THAT JUDGE WILL PRESERVE CONFIDENCE IN THE JUDICIARY AND PROMOTE ECONOMIC GROWTH

Consistent with the command that a "fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), this Court has made it clear that recusal is required where a judge has a significant personal interest in a case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). This Court has also written, in discussing the Due Process Clause, that "justice must satisfy the appearance of justice . . . and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (U.S. 1980) (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954) and *In re Murchison*, 349 U.S. at 136) (internal quotation marks omitted).

Due process not only protects litigants, but also furthers larger societal goals. One such goal is preserving the institutional legitimacy of the judiciary, which relies on public confidence in its independence and evenhandedness for its power. *See* THE FEDERALIST No. 78 (A. Hamilton) (J. Pole ed. 2005) (advocating the importance of "public and private confidence" in judicial integrity in order to avoid "univer-

sal distrust and distress"); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting) (noting "the importance of maintaining public confidence in the impartiality of the judiciary"). Another goal is permitting citizens—including investors and other economic actors—to "order their behavior." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). In light of these important aims, Amici urge the Court to hold that due process requires recusal of a judge who has received campaign contributions from a party to a case or its representatives so substantial that they create an appearance of bias or unfairness.

A. Litigants, Judges, and the Public at Large Believe that Campaign Contributions Influence Judicial Decisionmaking

The belief among the American business community that justice is evenhanded affects economic decisionmaking, reduces the perception of risk, and encourages consistent adherence to transparent rules of law. The integrity of the American judicial system allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of business and investment decisions. For American businesses such as Intel, Lockheed Martin, PepsiCo, and Wal-Mart, as well as CED's supporting organizations and the clients of members of DTCI and IDC, the ability to assess risks and calibrate benefits is critically important.

Corporations appear frequently in a variety of courts. Although it is not possible for litigants to

predict the outcome of any dispute or class of disputes with certainty, corporate actors can nonetheless make informed business decisions—and take informed risks—based on knowledge of the factual context in which disputes are likely to arise, the existing state of the law, and the judicial system as a whole. The influence of campaign contributions threatens to undermine such decisionmaking. Without exaggerating the predictability of judicial decisions, it certainly is true that, where outsized judicial contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.

There is strong evidence that the confidence of business executives in the elected judiciary has been impaired. In 2007, CED commissioned Zogby International to survey business leaders regarding state judicial election fundraising. Zogby surveyed 200 senior executives, primarily at companies with more than 500 employees. *See* Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3–4 (2007). The results show that American business leaders are concerned that disproportionately large campaign contributions are influencing judges' decisions and creating an unacceptable appearance of such influence. Four in five business leaders expressed concern that "financial contributions have a major influence on decisions rendered by judges," *id.* at 4, and survey respondents were nearly unanimous in their opinion that judges should recuse themselves from cases involving contributors, *id.* at 6.

These results comport with data that demonstrate that the American citizenry is less than completely confident of the impartiality of elected judges in cases involving contributors. Surveys in several states have found that voters overwhelmingly believe that campaign contributions influence judicial decisions.[2] Even judges themselves acknowledge the bias that results when judges hear cases involving donors. A 2002 survey of more than 2,400 state court judges found that 46% of the judges surveyed believe that judicial campaign contributions influence decisions by the recipients of those contributions. Greenberg Quinlan Rosner Research, Inc. & Am. Viewpoint, *Justice at Stake—State Judges Frequency Questionnaire* 5 (2002). A majority of state court judges believe judges should be prohibited from presiding over cases in which any party has contributed money to the judge's campaign. *Id.* at 11.

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[2] *See, e.g.*, N. Carolina Center for Voter Education, *American Viewpoint: North Carolina Statewide Survey* (June 2005) (86% of those polled believe campaign contributions too often lead to conflicts of interest); Commission to Promote Public Confidence in Jud. Elections, *Report to the Chief Judge of the State of New York* (June 29, 2004) (83% of those polled think that contributions have at least some influence on judicial decisions); A.B.A. Standing Committee on Jud. Independence, *Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns* (Feb. 2002) (nine out of ten Pennsylvania voters believe large campaign contributions influence judicial decisions); Texas Supreme Court Justice Thomas R. Phillips, State of the Judiciary Address to the 76th Legislature of the State of Texas (March 29, 1999) (83% of Texans polled thought that money had an impact on judicial decisions).

The very fact that these beliefs are so widespread is itself a serious threat. Indeed, the perception of bias has a pernicious impact whether or not the bias actually exists. The American Bar Association recognized the importance of perception and appearance of fairness in judicial decisionmaking in 1972 when it adopted the Model Code of Judicial Conduct, which subjects a judge to disqualification "in a proceeding in which his impartiality might reasonably be questioned . . . ." Model Code of Jud. Conduct, Canon 3C (1972) (current version at Model Code of Judicial Conduct, R. 2.11 (2007)).

Congress, too, has acknowledged the importance of the appearance of impartiality among judges. In 1974, it amended the federal judicial disqualification statute to require the recusal of any federal judge whose "impartiality might reasonably be questioned." 28 U.S.C. § 455 (2007). Congress adopted the Model Code approach in order to create an "objective standard . . . designed to promote public confidence in the impartiality of the judicial process . . . ." H.R. Rep. No. 93-1453 (1974), as reprinted in 1974 U.S. Code Cong. § Admin. News 6351, 6355. Even if judges are less vulnerable to influence by contributions than the public believes—and judges themselves profess to believe—the existence of the widespread belief undermines the confidence in judicial fairness that is a central component of a prosperous and growing economy.

B. Economic Research Demonstrates that Confidence in the Judiciary Is Fundamental to a Fair Legal Climate and Promotes Economic Growth

Economic analysis has addressed this same point in the context of developing economies. Research findings demonstrate that, where private parties reasonably expect that judges will enforce contracts and settle disputes impartially, transaction costs are lower, which in turn leads to a greater number of welfare-enhancing transactions. Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. OF POL. ECON. 497, 499 (2003). An evenhanded judiciary serves as "a device to turn promises . . . into credible commitments." *Id.* A survey of business leaders in five countries with developing economies found that those who express confidence in courts grant more trade credit and that countries where managers express such confidence have lower barriers to entry and greater overall productivity. Simon Johnson, John McMillan & Christopher Woodruff, *Courts and Relational Contracts*, 18 J. L. ECON. & ORG. 221, 260 (2002).

Consistent with this research, the World Bank and other growth-oriented global organizations have implemented programs to remedy and counteract the harmful economic effects of judiciaries plagued by corruption and partiality. *See* World Bank, *Anti-Corruption in Transition: A Contribution to the Policy Debate* (2000). As Rodrigo de Rato, former Managing Director of the International Monetary Fund, has acknowledged, "a competent and independent

judiciary is crucial to the development of business and financial systems." Rodrigo de Rato, Managing Director, Int. Monetary Fund, Luncheon Remarks at the Sixth Jacques Polak Annual Research Conference (Nov. 3, 2005); *cf.* Transparency Int'l, *Global Corruption Report 2007: Corruption In Judicial Systems* (2007) ("It is difficult to overstate the negative impact of a corrupt judiciary . . . it diminishes trade, economic growth and human development . . . .").

While there are many obvious differences between the United States' economy and judicial system and those of the countries at issue in this literature, the basic conclusion of the literature—that an expectation of impartiality in judicial decisionmaking promotes economic growth—applies squarely in this country.

II. IN LIGHT OF THE INCREASED COST AND POLITICIZATION OF JUDICIAL CAMPAIGNS, THE COURT SHOULD CLEARLY ESTABLISH THAT OUTSIZED CAMPAIGN CONTRIBUTIONS MADE BY PARTIES OR THEIR REPRESENTATIVES REQUIRE RECUSAL

In the four election cycles between 1999 and 2006, judicial candidates raised nearly twice the amount raised in the four previous election cycles. James Sample et al., *The New Politics of Judicial Elections* 15 (2006). In recent years, there have been exceptionally expensive judicial campaigns in states such

as Alabama,[3] Georgia,[4] Illinois,[5] and Wisconsin.[6] As judicial campaign contributions continue to increase in the 39 states that elect some or all of their judges, Am. Judicature Soc'y, *Judicial Selection in the States* 4–7 (2008), the frequency of recusal motions stemming from contributions by parties or their officers or counsel should increase as well.

Lower court judges, who in West Virginia and many other states are the sole arbiters of motions seeking their recusal, look to this Court to set the "outer boundaries of judicial disqualifications" required by federal due process. *Aetna*, 475 U.S. at 828. Currently, elected judges faced with recusal motions stemming from campaign contributions by parties or their officers or counsel have little guidance on where the due process boundaries lie. A statement from this Court that the outsized contributions made by Massey's CEO to Justice Benjamin's campaign "might lead him not to hold the balance nice, clear and true between the" parties, *Ward v.*

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[3] Eric Velasco, *TV Ads Drive Up Campaign Tab: Nabors-Cobb Race Costliest in Nation for Judicial Post*, Birmingham News, Oct. 15, 2006, at 17A.

[4] Jill Young Miller & Jeremy Redmon, *Foes in Judicial Contest Go Dirty*, Atlanta Journal-Constitution, Oct. 31, 2006, at A1.

[5] Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle*, Chicago Sun-Times, Nov. 1, 2004, at 18.

[6] Bill Mears, Big Money, *Nasty Ads Highlight Wisconsin Judicial Race*, CNN.com, Mar. 31, 2008, http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race.

Village of Monroeville, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), would provide lower courts with a much-needed benchmark against which to measure more frequent requests for recusal.

If Justice Benjamin's interpretation of federal due process is permitted to stand, state court judges may draw the conclusion that due process imposes no meaningful limits on their recusal decisions, and public and business confidence in judicial decision-making will continue to erode.

III. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL IN THIS CASE WILL PRESERVE FAIRNESS AND CONFIDENCE IN THE JUDICIARY WITHOUT LIMITING POLITICAL SPEECH

Many corporations and individual citizens exercise their constitutional right to political expression through contributions to judicial candidates and organizations who support them. This case does not call into question the propriety of such participation. That is so because recusal provides an effective and necessary means of avoiding an impermissible appearance of bias without restricting free speech. In fact, it serves to reinforce the legitimacy of widespread participation in judicial elections by demonstrating that campaign contributions are not a means for parties to purchase votes in their own cases. *See* Roy A. Schotland, *Judicial Elections in the United States: Is Corruption an Issue? in* Transparency Int'l, *Global Corruption Report 2007: Corruption In Judicial Systems* (2007) ("Campaign con-

tributions, unless severely abused, need not constitute corruption, but can create the appearance of a conflict of interest unless appropriate controls are applied.").

This Court has made clear that "[i]mpartiality" in the sense of "guarantee[ing] a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party" is not merely a state interest that might justify regulation, but is "essential to due process." *White*, 536 U.S. at 775–76. Indeed, Justice Kennedy's concurrence in *White* explicitly acknowledged that a federal due process floor exists independent of state recusal standards. *Id.* at 794 (noting a state's ability to "adopt recusal standards more rigorous than due process requires" in order to preserve the integrity of its elected judiciary).

Although some attempts to reconcile judicial impartiality and electoral accountability inappropriately infringe First Amendment rights, *see id.* at 787–88, recusal preserves due process and alleviates perceived bias without offending our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2665 (2007) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Here, a holding that Justice Benjamin's failure to recuse himself from Massey's appeal violated federal due process would in no way limit the rights of Massey's CEO or others to support candidates for judicial office. Nor would it restrict the ability of can-

didates like Justice Benjamin to campaign vigorously for judicial office. Nor would such a holding preclude judges from presiding over cases involving legal issues that generally have an impact on their largest supporters.

All participants in judicial campaigns, including the business community, would benefit if contributions were perceived as support for ideas and philosophies in the public forum rather than as attempts by particular parties to buy votes in pending or future cases.

CONCLUSION

For the reasons stated above, the Court should vacate the decision of the West Virginia Supreme Court of Appeals.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record

EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH M. EGAN
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

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IN THE

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On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ROY A. SCHOTLAND
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9098

GEORGE T. PATTON, JR.
BOSE MCKINNEY & EVANS LLP
700 North One Lafayette Centre
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 973-1229

THOMAS R. PHILLIPS
Counsel of Record
ANDREW F. YORK
BAKER BOTTS L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701
(512) 322-2565

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices is comprised of the Chief Justices or Chief Judges of the highest courts of each State, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands. Since 1949, the Conference has been a leading

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

national voice on important issues concerning the administration of justice.

The Board of Directors of the Conference of Chief Justices unanimously authorized the filing of an *amicus curiae* brief in this case by a special vote. Where, as here, a case involves review of a decision of a state Supreme Court, Conference policy provides that the Conference may file an *amicus* brief *only* if critical interests of the state courts are at stake, as they are in this case. In such cases, it is the policy of the Conference that it not take a position on the specifics of the decision of the state Supreme Court at issue. This *amicus* brief, therefore, does not take a position on whether the Due Process Clause of the Fourteenth Amendment required a Justice of the Supreme Court of Appeals of West Virginia to step aside in this appeal. This brief has been reviewed and approved by a special committee of the Conference chaired by the Chief Justice of North Dakota and composed of the Chief Justices of Indiana, Massachusetts, Ohio, South Carolina, Texas and Utah.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the concomitant due process or due course of law provisions of various state constitutions set a floor for when a judge must be disqualified or recused from sitting in a case. See *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997) (Due Process Clause establishes "constitutional floor, not a uniform standard" for judicial disqualification); *Fed. Trade Comm'n* v. *Cement Inst.*, 333 U.S. 683, 702 (1948) ("most matters relating to judicial disqualification [do] not rise to a constitutional level").[2] Each State sets more rigor-

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[2] In some jurisdictions, the terms "disqualification" and "recusal" are used interchangeably in all situations where a judge steps aside from hearing a case; elsewhere, one term or the other is used for all such situations; and in some, each term has a distinct meaning. See Rich-

ous requirements for disqualification and recusal within its own jurisdiction, through state constitutional provision, statute, court rule, judicially promulgated canon of ethics, local practice and/or legal precedent.[3] As heads of their respective judicial systems, the members of the Conference work to assure that their own jurisdictions, and the nation as a whole, have court systems that give, and are seen as giving, access to fair and impartial tribunals for all litigants to resolve their disputes.[4] At the same time, the members want their courts to treat all disputes efficiently and expeditiously, with minimal opportunities for parties to use delay or obfuscation to frustrate justice.

Accordingly, the Conference submits this *amicus* brief to urge the Court (1) to articulate the circumstances and conditions under which the Due Process Clause of the Fourteenth Amendment may prevent a state judge from presiding over a particular matter because of campaign support, and (2) to consider carefully the criteria that may be relevant in determining whether a particular judge is constitutionally disqualified in a particular matter. In an effort to assist the Court, this brief first

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ard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 3-4 (2d ed. 2007). Because of the variety of usages, this brief uses the terms interchangeably.

[3] See Flamm, *supra*, at 34-35, 824.

[4] These concerns are especially important because the majority of litigation in the United States occurs in state courts. Each year 47 million new non-traffic trial court cases and 283,000 appellate court cases are filed in the state courts. By contrast, in the federal courts, 320,000 new trial court cases and 5,500 appeals are filed, as are 1.8 million bankruptcy cases. See R. LaFountain, *et al.*, *Examining the Work of State Courts, 2007: A National Perspective from the Court Statistics Project* (Nat'l Ctr. for State Courts 2008); Admin. Office of the U.S. Courts, *Judicial Business 2007*, http://www.uscourts.gov/judbus2007/2007judicial%20business.pdf.

(1) surveys the diversity among the States in how judges are selected and when they may be recused from participating in a case, then (2) reviews the relevant constitutional principles articulated by this Court in prior disqualification challenges, and finally (3) sets forth some of the practical considerations that may be relevant in resolving a constitutional challenge involving campaign support.

SUMMARY OF ARGUMENT

The Conference takes the position that, under certain circumstances, the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings. As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled. Disqualification is an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal, particularly since First Amendment attacks have been leveled against several provisions of the States' judicial conduct codes.

A judge may be constitutionally disqualified from presiding over a particular matter for reasons other than actual bias or a financial interest in the outcome. These two categories alone are simply not broad enough to assure the due-process guarantee, which protects the right to a fair hearing if extreme facts create a "probability of actual bias * * * too high to be constitutionally tolerable,"[5] encompasses concerns about "possible temptation to the average * * * judge,"[6] "probability of unfairness,"[7] and

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[5] *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

[6] *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

[7] *In re Murchison*, 349 U.S. 133, 136 (1955).

not being "likely to maintain that calm detachment" necessary for a judge to deliver a fair adjudication.[8] In particular, political support for a judge may be so extremely extraordinary that due-process concerns are implicated.

Such instances will be rare, and must be evaluated pursuant to criteria applied concretely to the particular facts. Among the aspects to be analyzed are the size, nature, timing and effectiveness of the support, the supporter's prior political efforts, the pre-existing relationship between the supporter and the judge, and the relationship between the supporter and the litigant in the particular suit if they are not identical.

ARGUMENT

I. The Context Of Modern Judicial Campaigns

A. How Judges Are Chosen In The States

If distinctions are parsed finely enough, one can identify almost as many different methods of judicial selection as there are States in the Union. Unlike the federal system, which from its inception has selected judges by Presidential appointment and Senate confirmation for life terms during good behavior, the States have never used a common method of judicial selection. Moreover, most States have changed the way they choose judges at some point in their history, often more than once.[9]

Despite the many differences in state judicial selection systems, all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career.[10] And in many States, those

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[8] *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971).

[9] See generally Am. Judicature Soc'y, *History of Reform Efforts*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm.

[10] See generally Am. Judicature Soc'y, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm.

elections are freely and at times fiercely contested by rival candidates.[11] In many of those States, candidates run with the explicit label or at least the implicit imprimatur of a political party. And while in other States the elections are merely retention votes (that is, a "yes" or "no" on a judge's continued service) following an initial appointment—the so-called merit-selection plan—only one jurisdiction (Green County, Missouri) has moved to merit selection by popular vote in more than two decades.[12] That reality led the Conference of Chief Justices to adopt a Resolution in 2007 declaring, in part: "Whatever one's view of the desirability of judicial elections, a generation of experience (including recent rebuffs by the voters of Florida, Ohio, and South Dakota of attempts to eliminate [contested] judicial elections), makes it clear that elections will stay in many and perhaps all of the States that have that system."[13] Thus, if judicial elections create problems with the fairness—real and perceived—of judicial outcomes, the Conference of Chief Justices and other groups dedicated to enhancing the effective administra-

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[11] Nationwide, 60% of all appellate judges and 80% of all trial judges face either a partisan or nonpartisan contestable election. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077 apps. 1, 2 (2007) (National Center for State Courts data as of 2004).

[12] Am. Judicature Soc'y, *Press Release: Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), http://www.ajs.org/selection/sel_voters.asp (noting that the decision of a fifth Missouri county to adopt merit selection for local judges in 2008 "marks the first time since 1985 that a jurisdiction has moved from contestable elections to merit selection").

[13] Conference of Chief Justices, Resolution of February 7, 2007, http://ccj.nesc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html. Voters rejected merit selection in Ohio in 1987 and declined to extend merit selection from appellate to trial courts in Florida in 2000 and South Dakota in 2004. See Am. Judicature Soc'y, *History of Reform Efforts*, *supra*.

tion of justice in America must address those problems in ways that go beyond mere advocacy for judicial selection reform.

B. How Judicial Campaigns Are Funded

Most elections, whatever their type, share at least one commonality—if voters are presented with more than one candidate or have an opportunity to vote "no," the candidates themselves and their supporters bear primary responsibility for presenting the electorate with sufficient information to cast an informed vote. Only one State—Wisconsin—has any long-standing tradition of public financing, and that only for its Supreme Court.[14] While Wisconsin's system initially worked well, taxpayer participation in the voluntary income-tax check-off program that funds the campaigns has declined so dramatically that many candidates now reject public funding altogether.[15] Two States—North Carolina and New Mexico—have recently adopted voluntary partial public funding for appellate court elections.[16] But even if more

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[14] See Wis. Stat. § 11.50.

[15] In 2007, the available public funds for Wisconsin Supreme Court candidates totaled $60,816, which turned out to be 2% of the candidates' $2,655,423 spending. Taxpayer participation in the Wisconsin check-off system declined from 19.9% in 1979 to 8.7% in 1998. The number of candidates (for various statewide offices) opting into the public funding program dropped from 150 in 1986 to 92 in 1999. The 2007 funding data is from the Wisconsin Government Accountability Board (Richard.Bohringer@Wisconsin.gov); the candidates' reports are available at Wis. Gov't Accountability Bd., *Reports Filed Electronically*, http://elections.state.wi.us/financereport.asp. The earlier data is from Am. Bar Ass'n, *Report of the Commission on Public Financing of Judicial Campaigns* 27-29 (2002), http://www.abanet.org/judind/pdf/commissionreport4-03.pdf.

[16] See North Carolina Judicial Campaign Reform Act of 2002, N.C. Stat. §§ 163-278.61 to 163-278.70 (appellate judges only); New Mexico Voter Action Act, N.M. Stat. §§ 1-19A 1 to 1-19A-17 (amended in 2007 to include judges subject to statewide elections).

States adopt similar schemes, independent spending by private sources will continue unabated. Increasingly, in hotly-contested contests these uncoordinated independent efforts are dwarfing the amounts raised and spent by the candidates' individual campaigns.[17] The quaint notion that "judicial campaigns must focus their solicitations for funds on members of the bar," *Stretton* v. *Disciplinary Bd. of the Sup. Ct.*, 944 F.2d 137, 145 (3d Cir. 1991), has given way to high-dollar free-for-alls marked by dueling campaign salvos by organized interest groups, often located outside the State of the election.[18]

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[17] In North Carolina in 2008, Democratic Party spending resulted in the affected candidates being granted "rescue funds." Dan Kane, *Fund 'Rescued' Candidates from Themselves*, News & Observer, Oct. 24, 2008. And if the independent spending does not use "express advocacy," rescue funds are unlikely and perhaps unconstitutional. See *Fed. Election Comm'n* v. *Wis. Right to Life*, 127 S. Ct. 2652 (2007); see also Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—And How To Keep Our Courts Fair and Impartial* 8 (Justice at Stake Campaign 2004) (in the 2004 Supreme Court elections in Michigan and West Virginia, interest groups outspent candidates almost 4 to 1 on television advertising); James Sample, *et al.*, *The New Politics of Judicial Elections 2006: How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts—And How Americans Are Fighting Back* 20 (Justice at Stake Campaign 2006) (in the 2006 Supreme Court election in Washington, independent expenditures totaled more than $2.7 million, nearly doubling the amount raised by the candidates).

[18] Wide variations have always existed from State to State, depending on local culture and on formal campaign contribution laws. Thus, as a 1998 ABA Task Force Report showed, "[A]lthough often attorneys account for large proportions * * * it is also true that often attorneys' contributions total only a minor fraction. Given the diversity of our jurisdictions, of candidates and of campaigns, the lack of a general pattern is no surprise." Am. Bar Ass'n, *Report of Task Force on Lawyers' Political Contributions (Part Two)* 89 tbl.2 (1998).

C. The Dangers Of Judicial Elections

These more expensive, more visible judicial campaigns have undoubtedly placed new strains on the accepted norms of judicial behavior, both on the bench and on the stump. As more judicial races come to resemble campaigns for executive and legislative office, it becomes harder for both the candidates and the public to perceive the fundamental distinction between the neutral and reactive role of the judiciary and the policy-initiating branches of government. Yet these distinctions are fundamental to our system of assuring freedom through separated powers and checks and balances. Judge (later Justice) Cardozo described the judicial function in these terms:

> [A]n important distinction separates * * * judicial from legislative activity. * * * [T]he judge * * * ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.[19]

As the Conference of Chief Justices asserted in its *amicus* brief to this Court in *Republican Party of Minnesota* v. *White*:

> The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same

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[19] Benjamin Cardozo, *The Nature of the Judicial Process* 120-121 (1921). Although Cardozo ran unopposed for Associate Judge and then Chief Judge of the New York Court of Appeals, Andrew L. Kaufman, *Cardozo* 163, 181-182 (1998), he won his initial judicial race to the New York Supreme Court by defeating an incumbent judge on a party ticket in a very close race, *id.* at 125.

> electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would stand to lose the essential independence required for them to discharge their high constitutional duty of judicial review. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).[20]

Yet some have argued that contested elections without vigorous campaigns are the worst of all worlds. See, *e.g.*, Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 992, 994 (2001) ("Low voter turnout in judicial elections and inadequate information regarding judicial qualifications diminish the democratic significance of a judicial election. * * * Rather than scuttling elections because we fear voter ignorance, we should capitalize on elections as a vehicle for voter education."); *Adair* v. *State*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.) ("[G]iven the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname.").

D. State Regulation Of Judicial Campaign Conduct

Aware that the necessity of campaigns and campaign fundraising produces "[a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom* v. *Roemer*, 501 U.S.

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[20] Br. of Conference of Chief Justices as *Amicus Curiae* in No. 01-521, at 18 (Feb. 19, 2002).

380, 400 (1991), all 39 States with elective judiciaries have devised certain safeguards to help maintain the judiciary's unique role in the democratic process. The constitutions of every State with any kind of judicial elections impose unique requirements on judges, most of which would be unthinkable for other elected officials. In 38 of the States, judges' terms are longer than any other elective officials'.[21] In 37, only judges are subject to both impeachment and special disciplinary processes.[22] In 33, judges are the only elective officials, aside from attorneys general or prosecutors, who must meet special requirements of training and/or experience.[23] In 23, only judges are subject to mandatory age retirement.[24] In 21, only judicial nominations go through nominating commissions.[25] In 18, only judges cannot run for a nonjudicial office without first resigning.[26]

The principal safeguard against judicial campaign abuses, however, has been the States' codes of judicial conduct. In every State, the highest court has adopted such a code, usually modeled closely on the Model Code of Judicial Conduct of the American Bar Association. Every elective State has adopted some variant of the model code canon that specifically addresses judicial campaign conduct.

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[21] Br. of Conference of Chief Justices as *Amicus Curiae* in No. 01-521, at 6 (Feb. 19, 2002).

[22] *Id.* at 6-7.

[23] *Id.* at 7.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* In addition, *all* other States have a non-constitutional requirement of "resign to run." See *Per Curiam Opinion Concerning Amendments to Canons 5 and 6 of the Code of Judicial Conduct*, 61 Tex. B.J. 64 (Tex. 1998) (adopting resign to run in Texas and noting that every other State already required all or most judges to resign when seeking a non-judicial elective office).

E. Recent Challenges To Judicial Conduct Codes

The various provisions of the different States' codes went largely unchallenged until *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). In that case, this Court struck down the "announce" clause of Minnesota's Code of Judicial Conduct, which prohibited judicial candidates from "'announc[ing] [their] views on disputed legal or political issues.'" *Id.* at 768 (quoting Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2000)). The Announce Clause was taken from the 1972 ABA Model Code, but it had been deleted from the 1990 Model Code and remained in force in only eight other States. Because of its limited reach, and because the opinion explicitly cautioned that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," *White*, 536 U.S. at 783, the Court's decision had little immediate effect on state regulation of judicial elections. In the ensuing years, however, challenges have sometimes succeeded against other, more widespread provisions restricting judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"[27] and

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[27] Decisions striking down the Pledges and Promises Clause include at least *Bauer* v. *Shepard*, No. 3:08-CV-196, 2008 WL 1994868, at *3, *17-18 (N.D. Ind. May 6, 2008) (preliminary injunction); *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 976-977 (W.D. Wis. 2007) (enjoined as applied, not facially); *Pa. Family Inst., Inc.* v. *Celluci*, 489 F. Supp. 2d 447, 459-460 (E.D. Pa. 2007) (preliminary injunction) (later vacated, see below); *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 888-890 (N.D. Ind. 2006) (later vacated, see below); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1228-1232 (D. Kan. 2006) (preliminary injunction), questions certified, 519 F.3d 1107 (10th Cir. 2008), certified questions answered, No. 100,170, 2008 WL 5101311 (Kan. Dec. 5, 2008); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1082-1083 (D. Alaska 2005) (later vacated, see below); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d

from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[28] More to the point of this case, two circuits have struck down

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1021, 1035-1042 (D.N.D. 2005); and *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 690-704 (E.D. Ky. 2004), motion to stay injunction pending appeal denied, 388 F.3d 224 (6th Cir. 2004). Decisions upholding the clause include *Pa. Family Inst., Inc.* v. *Celluci*, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007); *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003); and *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003), cert. denied, 540 U.S. 825 (2003). Still other decisions have failed to reach the merits of the constitutional challenge to the clause. See *Ind. Right to Life* v. *Shepard*, 507 F.3d 545, 550 (7th Cir. 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 504 F.3d 840, 849-850 (9th Cir. 2007); *Pa. Family Inst., Inc.* v. *Black*, 489 F.3d 156, 169 (3d Cir. 2007); *Wolfson* v. *Brammer*, No. 3:06-cv-02357, 2007 WL 2288024, at *5 (D. Ariz. Aug. 8, 2007).

[28] Decisions striking down the Commit Clause include at least *Bauer* v. *Shepard*, No. 3:08-CV-196, 2008 WL 1994868, at *20 (N.D. Ind. May 6, 2008) (preliminary injunction); *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007) (enjoined as applied, not facially); *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 888 (N.D. Ind. 2006) (later vacated, see below); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1228-1232 (D. Kan. 2006) (preliminary injunction), questions certified, 519 F.3d 1107 (10th Cir. 2008), certified questions answered, No. 100,170, 2008 WL 5101311 (Kan. Dec. 5, 2008); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1082-1083 (D. Alaska 2005) (later vacated, see below); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005); *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004), motion to stay injunction pending appeal denied, 388 F.3d 224 (6th Cir. 2004). Decisions upholding the clause include *Pa. Family Inst., Inc.* v. *Celluci*, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007); and *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003), cert. denied, 540 U.S. 825 (2003). Still other decisions have failed to reach the merits of the constitutional challenge to the clause. See *Ind. Right to Life* v. *Shepard*, 507 F.3d 545, 550 (7th Cir. 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 504 F.3d 840, 952-953 (9th Cir. 2007).

code provisions that prohibit judges from personally soliciting campaign funds including from people likely to be litigants or lawyers in their courts.[29]

The Conference of Chief Justices believes that these rulings unduly extend this Court's holding in *White*. The Court should affirm the state courts' legitimate constitutional role in protecting the due process rights of all litigants to fair and impartial trials in elective judicial systems.

F. The Increasing Importance Of Recusal

Every State permits litigants who fear that they cannot receive impartial justice to ask for another judge to hear their case. American courts, like English courts before them, have always recognized the legal maxim *nemo debet esse iudex in propria causa*, or "no one should be the judge in his own cause." Thus, the federal system and every State have devised their own set of laws, rules, practices, procedures and/or precedents to govern challenges to judges in particular matters.[30] As might be expected, both the standards and procedures to disqualify a judge differ among the various jurisdictions.[31]

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[29] *Republican Party of Minn.* v. *White*, 416 F.3d 738, 763-767 (8th Cir. 2005) (en banc) (striking down clause as applied to solicitation to large groups); *Weaver* v. *Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) (striking down Solicitation Clause because "we believe that the Supreme Court's decision [in *White*] * * * suggests that the standard for judicial election should be the same as the standard for legislative and executive elections"); see also *Yost* v. *Stout*, No. 06-4122 JAR (D. Kan. Nov. 16, 2008) (granting summary judgment striking down the Kansas Solicitation Clause).

[30] See Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007).

[31] *Id.* at 488, 824 ("procedural prerequisites to disqualification vary greatly" and "precisely what a party needs to show in order to carry its burden on disqualification varies considerably from jurisdiction to jurisdiction").

Given the sharp rise in judicial campaign spending, the related increase in politicized judicial campaigns, and the emerging questions about the constitutionality of judicial conduct codes, recusal and disqualification have become ever more important in States with vigorously contested judicial elections. Justice Kennedy's concurrence in *White* notes that "[a]rticulated standards of judicial conduct may advance [judicial integrity]," which is "a state interest of the highest order."[32] States that choose an elected judiciary may "strive to define those characteristics that exemplify judicial excellence" and may "enshrine [their] definitions in a code of judicial conduct."[33] They may "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[34] The same groups who have challenged the other code provisions with some success have, with but a single exception, failed in their attempts to have code disqualification standards struck down.[35] As one recent study opined:

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[32] 536 U.S. at 793.

[33] *Id.* at 794.

[34] *Ibid.*

[35] The challenges failed in *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 887 (N.D. Ind. 2006); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1234-1235, 1239 (D. Kan. 2006) (preliminary injunction); *Carey* v. *Wolnitzek*, No. 3:06-36, 2006 WL 2916814, at *15-16 (E.D. Ky. Oct. 10, 2006) (finding challenge to recusal requirements not ripe for judicial review because no injury in fact); *Wolfson* v. *Brammer*, No. 3:06-cv-02357, 2007 WL 2288024, at *5 (D. Ariz. Aug. 8, 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1083-1084 (D. Alaska 2005); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d 1021, 1043-1044 (D.N.D. 2005); and *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 710 (E.D. Ky. 2004). The one successful challenge came in *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007).

> With the canons of judicial conduct looking increasingly precarious in the wake of *White*, courts and litigants are left with precious few reliable mechanisms to safeguard the constitutional right to due process. Recusal is one such remaining safeguard, and, because it is tailored to the specific factual circumstances of the case at issue, it does not trigger the same First Amendment scrutiny as canons limiting judicial speech.

James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* 25 (2008).

Thus, disqualification is perhaps the States' most reliable weapon for maintaining both the reality and the appearance of a "fair hearing in a fair tribunal" for every litigant. Through tailored case-by-case recusals, decided under clearly articulated standards, States can accomplish the same goals they have sought to achieve through speech, contribution or spending limitations, yet with little risk of First Amendment challenges.

G. Evolving Notions Of Disqualification

This new role for an old remedy has been enhanced by evolving notions of what circumstances properly require a judge to step aside. At common law, the only ground for disqualification was that the judge had a financial interest in the case at bar.[36] In modern times, instant communications, speedy travel, and, in most jurisdictions, a ready pool of available jurists now allow a substitute

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[36] *Liteky* v. *United States*, 510 U.S. 540, 543-544 (1994) ("Required judicial recusal for bias did not exist in England at the time of Blackstone. 3 W. Blackstone, Commentaries *361. * * * Not until 1911, however, was a provision enacted requiring district-judge recusal for bias *in general*."); see Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 573 (2004).

judge to be assigned with little expense or delay.[37] In these circumstances, judges should consider not only whether bias or self-interest actually exists, but also whether appearances would lead a reasonable person to think they exist.[38] Thus, Canon 3(E)(1) of the ABA's 1990 Model Code (now Canon 2, Rule 2.11(A) under the 2007 revisions) succinctly provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[39] This standard is now employed, either verbatim or in substance, by virtually every State, either by statute, procedural rule and/or code provision.[40] Canon 3(E)(1) of

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[37] Flamm, *supra*, at 600.

[38] See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911 (2007); M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. App. Prac. & Process 45 (2005); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000); Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 Hofstra L. Rev. 217 (1991).

[39] Reflecting rising recognition of the need to protect fair hearing rights, the current provision affords greater protection than its predecessor in the 1972 Model Code: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."

[40] See Sample, Pozen & Young, *supra*, at 17 (ABA's general standard incorporated into the judicial conduct codes of forty-seven States, counting Michigan, Montana and Texas as the exceptions). Texas, however, follows the ABA standard by rule. See Tex. R. Civ. P. 18b(2)(a) (a judge "shall recuse himself in any proceeding in which * * * his impartiality might reasonably be questioned"). Montana recently adopted the ABA standard in the 2008 Montana Code of Judicial Conduct, effective January 1, 2009. Rule 2.12 of which includes the "impartiality might reasonably be questioned" standard for disqualification. See *In the Matter of the 2008 Montana Code of Judicial Conduct*, No. AF 08-0203 (Mont. Dec. 12, 2008). Thus, only

West Virginia's Code of Judicial Conduct, for example, incorporates this provision into its disqualification standard. In turn, West Virginia's appellate rules provide that "[a] justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) or, when sua sponte, for any other reason the justice deems appropriate." W. Va. R.A.P. 29(b).

II. Due Process Requires Judges Who Will "Hold The Balance Nice, Clear And True"[41]

The Conference submits that the Due Process Clause may require a judge to step aside in some circumstances because of campaign support.[42] If the Due Process Clause requires recusal only when a party could prove actual bias arising from personal animus in the judge's heart or cold cash in the judge's pocket, then the rights of parties to a fair and impartial judge would be imperiled. Probabilities of unfairness, likelihood of bias, and unacceptable perceptions are at the heart of circumstantial

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Michigan has yet to adopt the ABA standard by rule or code. Michigan's Code of Judicial Conduct Canon 3(D) provides: "A disqualification of a judge may be remitted as provided by Michigan Court Rule 2.003(D)." Rule 2.003(D) provides that a "judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which: [list including personal bias for or against party or attorney, personal knowledge of facts, prior role as attorney in matter, economic interest, or third degree relationship to party, attorney, witness, or interested party]." At least one Justice of the Michigan Supreme Court has publicly advocated that Michigan adopt the ABA "impartiality might reasonably be questioned" standard. *Adair* v. *State*, 709 N.W.2d 567, 581 (Mich. 2006) (statement of Cavanagh, J.).

[41] *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

[42] Some litigants may "game" this system by filing meritless motions to secure delay, to run expenses, or to shop for a better forum. States employ various means to terminate baseless or bad-faith motions quickly and efficiently.

evidence, which is sometimes the only evidence available on the issue of whether a judge is constitutionally required to disqualify.[43] Few of this Court's cases involving due process challenges to a judge involve direct evidence of bias—instead, they involve circumstances where the probability of judicial bias is intolerable, regardless of the particular judge's actual state of mind.

When a challenge was lodged to a conviction rendered by a judge and mayor who received court costs in the event of conviction but nothing for acquittal, the Court held: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof * * * or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). This Court did not consider whether the adjudicator was actually biased. Rather, the Court evaluated the circumstances and decided that the probability of bias for this judge was too great for the Constitution to countenance.

Due process would risk being a mere façade if it ignored all concerns about "the probability of unfairness." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) ("[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases. But our system

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[43] See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1087 (1996).

of law has always endeavored to prevent even the probability of unfairness."). For example, this Court held that due process required a state supreme court justice to step aside from reviewing a verdict for bad-faith refusal to pay an insurance claim because the justice was at that time pursuing his own bad-faith suit against an insurance company and the legal principles established by the state supreme court's decision had an impact on the outcome of the justice's own case. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986). This Court did not "decide whether in fact Justice Embry was influenced," but noted that the "possible temptation" that the circumstances offered "to the average * * * judge to * * * lead him not to hold the balance nice, clear and true" was enough to require recusal under the Due Process Clause. *Ibid.* (quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey*, 273 U.S. at 532)).

Similarly, this Court held that due process required the recusal of a judge who had been subjected to repeated verbal abuse by a criminal defendant because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971). This "likel[ihood]" of bias was sufficient to require recusal under the Due Process Clause—despite the absence of any evidence that the judge harbored an actual bias against the defendant.

"The requirement of neutrality has been jealously guarded by this Court." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). To give litigants the benefit of an unbiased and impartial judge, the Constitution forbids procedures that create a probability that prejudice will result. See *Connally* v. *Georgia*, 429 U.S. 245, 250-251 (1977) (due process is violated when justices of the peace are only paid when they issue search warrants, even if actual bias is not shown); *Morrissey* v. *Brewer*, 408 U.S.

471, 485-486 (1972) (due process is violated when a parole officer makes the determination of whether reasonable grounds exist for the revocation of parole because "[t]he officer directly involved in making recommendations cannot always have complete objectivity in evaluating them"); *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, * * * due process is denied by circumstances that create the likelihood or the appearance of bias"); *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (due process is violated when key witnesses serve as bailiffs for jury; no showing of actual bias is required because the circumstances are inherently suspect); *Jackson* v. *Denno*, 378 U.S. 368 (1964) (jury simultaneously deciding admission of evidence and guilt of defendant violates due process regardless of whether defendant can show jury bias). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136. The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance * * * .'" *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974) (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964)).

Applying this rule, this Court held that an administrative board composed of optometrists violated the litigants' due process rights by presiding over disciplinary hearings against competing optometrists. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). Moreover, this Court held that it was inconsistent with due process for a village mayor to preside over a hearing for violation of a village ordinance where the mayor was responsible for the village's finances, which depended to a significant extent

upon the fines levied in such proceedings. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

The appearance of likely bias is relevant not solely to public perception and confidence in the judicial system, but may be the only evidence of actual bias. Often there is simply no provable evidence of actual bias; even the judge might be unconscious of its presence. Indeed, appearances arising from specific facts may be the only indication that actual bias is present in fact.

While there is a presumption of integrity in the judiciary, the very fact that it is merely a presumption indicates that in some situations it can and will be overcome. Thus, in evaluating whether a judge's potential bias violates a litigant's due process rights, the question is not whether a judge of the highest integrity may be able to resist the temptation of partiality. Rather, the question is whether an average judge would be tempted under the circumstances.

Given the ubiquity of judicial elections and the ever-increasing amounts of campaign spending in those elections, circumstances can be imagined in which campaign support "'would offer a possible temptation to the average man as a judge to forget the burden of proof required * * * or which might lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). Therefore, one cannot say categorically that campaign support can never rise to such magnitude that a judge would be constitutionally prohibited from sitting in a case where the source of that support has a substantial stake in the proceedings.

Because the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case, no bright-line rule can or should be attempted. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such

procedural protections as the particular situation demands."); *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * * '"Due process" * * * is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * * .'"). "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results." *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934) (Cardozo, J.).

Some may claim that allowing any due process challenge to an elective judge because of campaign support might open the floodgates for thousands of constitutional disqualification challenges against elective judges who preside over cases involving supporters and contributors. Such a fear, the Conference submits, is unfounded. A due process review of a challenged failure to recuse would be limited to cases of extraordinary support. Indeed, we know of only two other instances as extreme as this one in terms of size of the expenditure and percentage of the total support for a candidate. Even if one might raise more examples from the decades of thousands of campaigns and scores of millions in spending, there clearly are few outliers.

The first instance was in the 1982 Texas Democratic Primary, where an active litigant, a controversial "South Texas rancher and oil man," contributed $200,000 to one unsuccessful Supreme Court candidate, accounting for over 90% of that candidate's contributions, as well as about 33% of the funds raised by a successful Supreme

Court candidate.[44] The second instance came in a supreme court race in Illinois in 2006, where justices are elected from districts, not statewide. The employees and other persons affiliated with a party to a case directly contributed over $350,000 to the successful candidate; in addition, some of them founded a PAC that directly contributed another $1.2 million.[45]

III. Criteria For Evaluating Whether Due Process Requires Recusal For Campaign Spending In A Particular Case

This case is an opportunity, acutely needed, to clarify the analysis to be considered in deciding whether a recusal is constitutionally required because of campaign support. After all, if there are judicial elections, there will be campaigns and campaign spending. Even though judicial campaign spending has risen more sharply in recent years than other campaign spending,[46] and even though high-dollar campaigns have undoubtedly affected public perceptions about judicial impartiality,[47] not every

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[44] Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 84 (1986); Asker, *'82 Supreme Court Races Signal End of Era, Assert Winners, Losers*, Houston Post, May 3, 1982.

[45] See Pet. in *Avery* v. *State Farm Mut. Auto. Ins. Co.*, No. 05-842, at 6-8 & n.2 (Dec. 27, 2005); see also Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 509-511 (2007). The relevant district's total population was 1,290,401. See *2005 Annual Report of the Illinois Courts: Administrative Summary* 29.

[46] See Bert Brandenburg & Leo A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 Geo. J. Legal Ethics 1229, 1230 n.5 (2008).

[47] For two national polls and eight single-state polls conducted between 1995 and 2004 reflecting p ıblic skepticism about the effect of contributions on judicial outcomes, see Thomas A. Gottschalk, *Judicial Recusal as a Campaign Finance Reform* app. A (Sandra Day O'Connor Project on the State of the Judiciary, 2008 Conference:

judge who has been involved in a high-dollar, vigorous campaign can be presumed to have a probability or likelihood of bias whenever a matter in which some supporter is vitally interested later comes before the judge's court.

The Conference of Chief Justices submits that several criteria must be evaluated in deciding whether campaign support has been so egregious as to create a "probability" or "likelihood" of bias that would jeopardize a litigant's due process right to a fair hearing. The following seven criteria are neither exclusive nor exhaustive, but they do reflect issues that we have encountered in the judicial campaign finance context and that we believe are relevant to a constitutional inquiry.

A. Size Of The Expenditure

The amount of support given by the interested party must be considered. No set amount can be labeled as "beyond the pale" for all cases; circumstances *always* matter. For example, the size of the jurisdiction and the electorate to be persuaded is crucial: What is exorbitant in a small city like The Dalles, Oregon, may be unre-

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Our Courts and Corporate Citizenship) (publication forthcoming). Some media attention about contributions to judicial campaigns unduly amplifies concerns about impropriety. For example, the *New York Times* reported a forthcoming law review article that attacked Louisiana Supreme Court Justices about their campaign contributions. But the *Times* never reported (except on NYTimes.com as an "Editor's Note Appended," Sept. 20, 2008) that, after publication, the author's dean (at Tulane Law School) sent a formal apology to that court because of the article's errors. See Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. Times, Jan. 29, 2008; Vernon Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291 (2008); Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, Times-Picayune, Sept. 16, 2008.

markable in a metropolitan jurisdiction like Dallas, Texas. Standard practice in a jurisdiction is also a vital component; an amount of support that is outrageous in a State like Minnesota, which has for many decades had only low-key judicial contests, might be routine in a smaller State, such as Alabama, where multi-million dollar court races are frequent. See *Randall* v. *Sorrell*, 548 U.S. 230, 252-256 (2006) (considering local practice in determining the constitutionally of Vermont's campaign regulation). Even within a single State, from year to year, from court to court, or from county to county, an amount that might possibly offend due process in one instance will simply not in another.[48]

B. Nature Of The Support

Second, the nature of the support, and its benefit to the candidate and his or her candidacy, must be considered.[49] In some jurisdictions, a judge must sign the public reports detailing all contributions to his or her campaign; but the judge has no similar knowledge about any independent support. In some jurisdictions, judicial candidates control their campaign treasuries and have wide discretion over how to spend or dispose of campaign

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[48] Presumably, a contribution that complied with a contribution limit set by statute or rule would not violate due process. However, situations may arise that would test that proposition. For example, if every member of one law firm contributes the maximum amount allowed and if the aggregate of those contributions constitutes (say) 80% of a candidate's campaign funds, such support would comply with the law but might be such an out-of-line concentration of support as to raise obvious concerns.

[49] A further problem is caused by direct contributions or independent expenditures *against* a judge. On the one hand, efforts to defeat a judge are every bit as likely to affect that judge's attitudes toward a party as are efforts to support that judge. On the other hand, a wealthy lawyer or litigant could always consider spending enough to defeat or at least disqualify a disfavored judge.

funds; independent expenditures risk being illegal if the candidate exercises any control over them or even coordinates with them. A problematic direct contribution could be returned, but a candidate has no power over independent expenditures, whether effective or not.[50]

C. Timing Of The Support

Third, the timing of contributions or independent support is a critical factor. If the supporter's case is pending or about to be pending before the court on which the candidate sits or to which he or she seeks election, obviously a large contribution or expenditure is more likely to create a probability or likelihood of bias than if the case had not yet arisen or its assignment was subject to a random process so that it might never come before the successful candidate.[51] Obviously, the more remote in time the sup-

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[50] Although some people are skeptical about the "independence" of independent spending, not only is there a constitutional right to such participation in campaigns, but at least in judicial campaigns, independent spending has backfired against the candidate it was intended to advance. One instance was in 2000, when the Chief Justice of Mississippi's defeat was apparently due to reaction against an independent effort. See Associated Press, *Chief Justice Asks U.S. Chamber of Commerce to Stop Running TV Ads*, Comm. Appeal, Oct. 22, 2000; Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. M.S.U.-D.C.L. 849, 877. Similarly in North Carolina in 1986, the Chief Justice's defeat was caused at least in part by independent spending aimed at supporting her. The Chief Justice described the independent group's effort: "Some of their tactics * * * were offensive, and I asked them to discontinue them, but * * * I had no means of controlling them. * * * I know that they offended a large number of people." Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1404 (2001) (quoting letter to author from former Chief Justice Rhoda Billings).

[51] One example of problematic timing: A challenge was made to two justices of the Ohio Supreme Court who had received large contributions from a law firm only three weeks before voting on whether or not to review a particular case. The firm had a multi-million dollar

port was given, the less likely it is to create problems of a constitutional magnitude.

D. Effectiveness Of The Support

Fourth, the effectiveness of the support, both actual and perceived, must be considered. This is particularly true of independent expenditures—the more the message is pointed to the particular campaign, the more likely that it might constitute a due process violation.

E. Nature Of Supporter's Prior Political Activities

Fifth, the supporter's record of campaign activity must be considered. If the supporter has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past, the support for one jurist who may later happen to preside over a case in which the supporter was involved would raise less suspicion than if the support was novel or extraordinary.

F. Nature Of Supporter's Pre-Existing Relationship With The Judge

Sixth, the history between the supporter and the judge must be explored. A prior friendship or professional relationship may help explain the size of the support, but may raise other, perhaps still more pertinent concerns about the probability or likelihood of judicial bias. If the contributor had roles beyond writing a check, such as chairing a campaign committee or raising money from others, that may exacerbate the situation. On the other hand, if the judge in question has decided other matters involving the supporter with no indication of

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contingent fee at stake in the matter and contributions from the lawyers and their spouses amounted to almost five percent of each justice's total campaign funds. See Pet. in *Consol. Rail Corp.* v. *Wightman*, No. 99-950, at 7-8 (Mar. 6, 2000).

bias, then concerns about a lack of fairness may be reduced.

G. Relationship Between The Supporter And The Litigant

Finally, the relationship between the supporter and the party to the case must be considered. Of course, when the outlying support is provided by an individual litigant, the relationship is obvious and no further questions arise. But should the same rules apply to support by a party's lawyer? And if the party is a corporation, partnership or other entity, and the donor is an officer, director, partner, shareholder or employee of the party, then the exact nature of the relationship must be explored. Obviously, the closer the identity between the supporter and the party, the more likely that due process concerns will be implicated.

CONCLUSION

Amicus curiae, the Conference of Chief Justices, respectfully requests that this Court clarify the applicability of the Due Process Clause to motions to disqualify based on campaign support and articulate the considerations that should be weighed in deciding whether the Constitution requires recusal.

Respectfully submitted.

ROY A. SCHOTLAND
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9098

GEORGE T. PATTON, JR.
BOSE MCKINNEY &
EVANS LLP
700 North One Lafayette Centre
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 973-1229

THOMAS R. PHILLIPS
Counsel of Record
ANDREW F. YORK
BAKER BOTTS L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701
(512) 322-2565

Counsel for Amicus Curiae

January 2009

AMICUS CURIAE BRIEF

No. 08-22

In The
Supreme Court of the United States

HUGH M. CAPERTON, ET AL., *Petitioners,*
v.
A. T. MASSEY COAL COMPANY, ET AL., *Respondents.*

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)

February 4, 2009

Question Presented

1. Whether the Due Process clause of the Fourteenth Amendment requires mandatory recusal based on the 'debt of gratitude' a judge might feel on account of campaign contributions or independent expenditures made on the judge's behalf?

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

Requiring recusal based on campaign spending represents a break from longstanding American traditional. States have long preferred elections as the means of selecting their judges because of the special role that state judges play in developing a state's law. With rare exceptions, judicial elections have been funded through campaign contributions. Yet despite the fact that these elections have been funded almost exclusively through private spending, campaign spending has traditionally not been taken to justify mandatory recusal where the spending party appears before a judge as a litigant.

This is doubly true of mandatory recusal under due process, which sets only a minimal standard for mandatory recusal, and is limited to where a judge has a direct pecuniary interest in the case. Requiring judges to recuse themselves based on campaign spending would replace the presumption of impartiality traditionally accorded to judges with a presumption of corruption, and by basing recusal on past rather than present circumstances, would limit a judge's ability to control the circumstances under which she must recuse.

Attempts to justify mandatory recusal as a means of preventing corruption fail, as they typically confuse correlation with causation. Contributions might be used as a means of influencing judges, or it might be that people contribute to candidates who they believe share their values and views. There is no compelling evidence that judicial decision-making is improperly influenced by contributions, and the case that judges

are improperly influenced by independent expenditures is even weaker. In any event, any risks posed to judicial impartiality by campaign spending are inherent in a state's choice to opt for judicial elections, so that any argument that such spending violates due process is functionally an argument that judicial elections are unconstitutional.

Nor can mandatory recusal be justified as a means of preserving public confidence in the judiciary. In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public. While polling data reveals a healthy skepticism from the public as to the role of money in politics, the same surveys indicate that this generalized cynicism has not translated into a loss of public confidence in the courts. The courts are consistently among the highest ranked institutions in terms of public confidence.

Far from preserving judicial impartiality, mandating recusal based on campaign spending has the potential to impede the swift execution of justice and undermine public confidence in the judiciary. Mandating recusal based on campaign spending could increase exponentially the cases where recusal is required, which would not only pose severe burdens on litigants and judges, but could bring the judiciary into disrepute. Requiring mandatory recusal based on campaign spending also leaves judges vulnerable to strategic action by potential parties and their attorneys.

These problems cannot be avoided by requiring recusal only in exceptional cases. In fact, adopting an amorphous test for when recusal is required would add a new level of uncertainty to the legal process, and

could lead to an even greater increase in recusal requests. And if recusal is required based on campaign spending, then it is hard to see why the same principle would not require recusal of a judge based on the support they received during a confirmation battle or during the appointment process.

Argument

I. Mandatory Recusal Based on Campaign Spending is Contrary to Long Standing Legal Traditions and Principles.

A. Campaign Contributions Play an Essential Role in Judicial Selection.

Judicial elections have a long history in the United States. Election of judges began in Georgia localities in 1789, and by the Civil War twenty-one of the thirty states in the Union elected their judges. Roy A. Schotland, *New Challenges To States' Judicial Selection*, 95 Geo. L.J. 1077, 1093 (2007). This tradition has continued to the present day, with thirty-nine states currently selecting some or all of their judges via election. *Id.* at 1094.

Where the public has been given the option to replace judicial elections with some other system, such proposals have been roundly rejected. Since 1969, attempts to abolish or restrict judicial elections by ballot measure have been rejected by the voters in Pennsylvania, Illinois, Nevada, Tennessee, Florida, Oregon, Arkansas, Ohio, Louisiana, and South Dakota, in some cases multiple times. *See* Am. Judicature Soc'y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Initiatives*, *available at* http://-www.judicialselection.us/uploads/documents/Merit_s

election_chronology_1C233B5DD2692.pdf; *see also* Anita Kumar, *Referendum--Judicial Selection: Floridians Keep Right to Elect Judges*, St. Petersburg Times, Nov. 8, 2000, *available at* http:// pqasb.pqarchiver.com/-sptimes/index.html?ts (Florida referendum allowing merit selection and retention election of Florida trial court judges was defeated 61% to 38%). In fact, aside from a popular referendum approving merit selection for judges in Green County, Missouri, no referendum moving a jurisdiction from popular election to some other method of judicial selection has been approved in over twenty years. Am. Judicature Soc'y, *Press Release: Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), *available at* http://www.ajs.org/-selection/sel_voters.asp.

The public's continued support for judicial elections is based in part on the special role that state judges play in developing a state's law. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Elections ensure that judges are held accountable to the people, rather than to political elites and insiders, and provide a mechanism to keep judges within their legitimate bounds. Because judges are given a predominant role in setting public policy, popular sovereignty and democracy require that the people play a role in determining the make-up of the courts. *See generally* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 First Amend. L. Rev. 180 (2007).

With rare exceptions, judicial elections have been funded through campaign contributions. While three states have recently enacted limited public funding for some judicial elections,[2] the main source of funding for judicial elections, as with elections generally, has been campaign contributions. *See Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (noting that "campaigning for elected office necessarily entails raising campaign funds"); *see also White*, 536 U.S. at 789 (O'Connor, J., concurring) ("[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising").

Despite being an ubiquitous feature of judicial elections, campaign spending, whether in the form of contributions or independent expenditures made on a candidate's behalf, have traditionally not been taken to justify mandatory recusal where the party who has spent money on behalf of a judge appears before him as a litigant, even where the amount of spending has been substantial. *See, e.g., Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998); *Massongill v. County of Scott*, 991 S.W.2d 105 (Ark. 1999); *Ex Parte Kenneth D. McLeod, Sr. Family Ltd. Partnership XV*, 725 So. 2d 271 (Ala. 1998); *Anguilar v. Anderson*, 855 S.W.2d 799 (Tex. App. 1993); *Keane v. Andrews*, 555 So. 2d 940 (Fla. Dist. Ct. App. 1990). Given this "'universal and long-established' tradition" of not requiring recusal

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[2] *See* N.C. Stat. §§ 163-278.61 to 163-278.70; N.M. Stat. §§ 1-19A-1 to 1-19A-17; Wis. Stat. § 11.50.

based on campaign spending, this Court should maintain its "strong presumption" that mandatory recusal is not required in such cases. *See White*, 536 U.S. at 785 (*quoting McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375-377 (1995) (Scalia, J., dissenting)); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.")

B. Due Process Sets Only a Minimum Standard for Recusal.

At common law, disqualification standards were narrow and simple: "[A] judge was disqualified for direct pecuniary interest and for nothing else." John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947). The standard, borrowed from English law, stated that no man shall be a judge in his own case. *See, e.g., Dr. Bonham's Case*, 77 Eng. Rep. 638 (K.B. 1609) (holding by Lord Coke that members of a board determining physicians' qualifications could not both impose and personally receive fines). Beyond disqualification for pecuniary interests, according to Blackstone, a judge was free to hear any matter before him. William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, *361 (1765).

This Court has clearly adopted the common law rule as the standard for determining when recusal is required under the Due Process clause. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986) (supporting disqualification of a judge whose ruling would impact the relevant law in two cases in which the judge was a plaintiff); *Ward v. Vill. of Monroeville*,

409 U.S. 57, 61–62 (1972) (holding that a city mayor could not serve as a traffic court judge because the matters coming before such a judge involved funding for town finances); *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (finding a judge should be disqualified because he would only be paid if the defendant was convicted).

The federal courts, however, have been reluctant to hold that due process necessitates disqualification for other types of bias. *See, e.g., Tumey*, 273 U.S. at 523 (finding recusal was not constitutionally mandated where kinship or personal bias were at issue). Instead, other types of bias are left as matters of legislative discretion. *Id.* ("[M]atters of kinship [or] personal bias . . . would seem generally to be matters merely of legislative discretion."); *see also FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). As the Seventh Circuit has noted:

> [T]he constitutional standard the Supreme Court has applied in determining when disqualification is necessary recognizes the same reality the common law recognized: judges are subject to a myriad of biasing influences; judges for the most part are presumptively capable of overcoming those influences and rendering evenhanded justice; and only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption of evenhandedness.

Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372–73 (7th Cir. 1994).

Due process sets only a minimal standard for mandatory recusal, while leaving states free to adopt more stringent standards where no other constitutional right is implicated. *White* 536 U.S. at 794 (Kennedy, J., concurring) (noting that states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.")

C. Mandatory Recusal Based on Campaign Spending Turns Traditional Recusal on Its Head.

Petitioners' proposal that judges be required to recuse themselves based on campaign spending would alter traditional recusal standards in several respects. First, the American judicial system has traditionally granted judges a presumption of impartiality, which can be overcome only by objective evidence of actual bias. *See Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("[W]e accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office") (internal citations and quotations omitted)); *see also Del Vecchio*, 31 F.3d at 1372 ("We expect—even demand—that judges rise above their potential biasing influences, and in most cases we presume judges do."). Requiring recusal based on campaign spending would replace this presumption of impartiality with a presumption of corruption.[3]

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[3] In this regard, a number of the amici attempt to justify mandatory recusal based on campaign spending by

Second, while recusal has traditionally been required where a judge has a pecuniary interest in the outcome of a case, disqualification was mandatory only for a presently existing pecuniary interest, not for a previously received financial benefit. A judge, for example, could not hear a case involving a company in which he owned stock. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1)(c), 3C(3)(c) (1972) (requiring a judge to disqualify himself when he "has a financial interest . . . in a party to the proceeding . . . ." where "financial interest" is defined to include "ownership of a legal or equitable interest, however small . . . ."). This impediment, however, continued only as long as the judge retained ownership of the stock. *See, e.g.*, 28 U.S.C. § 455(f) (2000). As soon as the judge sold the stock, the impediment was removed, and no basis for disqualification would remain. Recusal is not required where a judge had owned party stock at some point in the past (on the theory that the judge might feel indebted to the party based on the financial benefits he had received from the company).

Where recusal has been held to be required by due process, it has been premised on present rather than past circumstances. In *Tumey*, for example, the Supreme Court held that a village mayor could not

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citing to a World Bank study of the effects of judicial corruption in the developing world. *See* Brief of the Committee for Economic Development, et al. at 12; Brief of the Center for Political Accountability, et al. at 15. Such attempts to justify recusal by comparing American judges to judges in countries known for having high levels of corruption evinces a rather low opinion of the members of the American judiciary.

preside over criminal proceedings where the mayor was paid only if the defendant was convicted and where the village received a share of the fine. The inability of the mayor to hear these cases, however, continued only so long as these provisions remained in effect. *Tumey*, 273 U.S. at 534. Likewise, *Aetna* involved a state supreme court justice who was, apart from his judicial duties, pursuing a bad-faith suit against an insurance company. *Aetna*, 475 U.S. at 817. This Court held that it violated due process for the judge to participate in a similar case involving bad-faith refusal to pay an insurance claim because the court's decision could have had a direct impact on the outcome of his own case. This Court gave no indication, however, that the justice would be prevented from hearing such cases once his own suit had been resolved.[4]

Limiting mandatory disqualification to presently existing pecuniary interests serves several salutary purposes. Requiring a judge's recusal whenever she had received a financial benefit from a party at some point in her life would, of course, be highly impractical. Confining recusal to presently existing pecuniary

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[4] Aside from *Tumey* and *Aetna*, Petitioners cite *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), a case in which it was held that a judge could not preside over criminal contempt proceedings involving verbal abuse of the judge. This case, however, did not involve any potential financial gain or loss on the part of the judge, but rather turned on the common sense principle that "a judge should not preside in a case in which he was the victim of a crime." *Del Vecchio*, 31 F.3d at 1392.

interests thus prevents disqualification from becoming a method of paralyzing justice, rather than of preserving it. Basing mandatory disqualification on present circumstances also gives judges a means of remedying the circumstances requiring recusal if they so choose. This provides judges with both a means and an incentive to limit the instances in which they would have to recuse, which served the smooth application of the judicial process.

The same is not true of mandatory recusal based on past campaign spending. Since a judge cannot undo a contribution once made, such impediments cannot be remedied. And insofar as recusal is mandated based on independent expenditures made on the judge's behalf, the circumstances requiring a judge's recusal will be totally out of her control. Thus, requiring recusal based on campaign spending destroys a judge's ability to limit the circumstances requiring her recusal, and adds a level of uncertainty into the judicial process.

More importantly, a presently existing pecuniary interest differs fundamentally from a previously received financial benefit in that only in the former case is the benefit conditioned on the judge's decision in a case. If a judge who has received a substantial contribution from a particular party later rules against that party, the judge need not return the money. Whereas in *Tumey* and *Aetna*, the judges in question did stand to lose out financially if they ruled in a certain way.[5]

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[5] One might argue that ruling against a party might make them less likely to contribute to a judge in the future, but this will be true of *any* party, regardless of whether this

Finally, the recusal in cases involving pecuniary interests traditionally followed a bright-line rule: unless the amount involved was truly *de minimus*, any pecuniary interest, regardless of its size, was considered disqualifying. Petitioners' proposal, by contrast, seeks to replace this bright-line standard with an amorphous test in which recusal is required only for "substantial" campaign spending. Given the practical difficulties involved in requiring recusal whenever a contributor appears before a judge, this is understandable. But if the fact that a judge has received contributions or benefitted from independent expenditures made by a party really does amount to having a pecuniary interest in the outcome of the case, then it is hard to see as a matter of constitutional principle why recusal should be required only based on "substantial" campaign spending.

In fact, if recusal is to be required based on campaign spending on the theory that contributions and independent expenditures might improperly influence the judge, then it would be hard to see why the same principle would not require recusal of a judge in many other cases as well. The confirmation process for federal judges, for example, often involves large independent expenditures made in support of or in opposition to the confirmation of a given judge. *See* Press Release, Brennan Center for Justice, TV Advertising Data Reveals Group Adopting Different Strategies in Alito Confirmation Battle (Jan. 26, 2006), *available at* http://www.brennancenter.org/press_detail.asp? key=100&subkey=34246. Any threat to

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party has contributed to the judge in the past.

judicial impartiality posed by such independent expenditures would appear to be present regardless of whether the expenditures are made in support of a judge's election or if they are made in support of her confirmation. Yet due process clearly does not require a judge to recuse herself every time a group that supported or opposed her candidacy appears before her as a litigant.

II. Mandatory Recusal Based on Campaign Spending Is Not Necessary to Protect Judicial Impartiality.

A. The Evidence Does Not Support a Corrupting Effect From Campaign Spending.

Arguments in favor of mandatory recusal based on campaign spending are generally based on the fear that such contributions and expenditures will improperly influence judicial decision-making, harming judicial impartiality and ultimately due process. A judge, it is feared, may feel indebted to a party whose financial assistance helped get her elected. *White*, 536 U.S. at 790 (O'Connor, J., concurring); *see also* Petitioner's Brief, at 31 (arguing that "[i]t would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship for his extraordinary efforts on the campaign's behalf"). Alternatively, there is concern that a judge may rule in favor of a particular party in order to receive additional contributions in the future. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent L. Rev. 133, 138 (1998) ("There is a grave risk that a judge will be more favorably disposed to those who gave or spent

money and those who might be counted on for contributions or expenditures in the future.").

Corruption is a serious charge, and serious charges demand serious evidence, particularly where, as here, one must overcome the presumption of impartiality accorded to judges. *Cf. Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000) (noting that "[t]his Court has never accepted mere conjecture as adequate to carry a First Amendment burden"). To date, however, evidence supporting claims of corruption based on contributions has been mixed at best.

It is difficult to test empirically whether campaign contributions influence official decision-making because of what is known as the endogeneity problem. Even assuming that votes by elected officials are correlated with the wishes of their contributors, this does not tell us anything about the direction of causation. An elected official might be influenced to vote in a certain way by a contribution; alternatively, a contributor might donate to a candidate because she perceives (correctly) that the candidate shares her position on a given issue. *See generally* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 62 Rev. Econ. & Stat. 77 (1982). Any attempt to show a corrupting effect on the judiciary caused by campaign contributions, therefore, must show not only that judicial decisions are correlated with campaign contributions, but also that this correlation is due to contributions influencing votes, rather than the other way around.

A great deal of empirical work has been done on the connection between contributions and voting in the legislative context over the last few decades. Numerous studies have found that contributions have little to no influence on legislative decision-making.[6] Others have claimed to find a more significant effect.[7] Overall,

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[6] *See* Stephen Ansolabehere *et al.*, *Why Is There So Little Money in U.S. Politics?*, J. Econ. Persp., Winter 2003, at 105, 116; Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & Econ. 317, 346-47 (1997); Frank J. Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 166-72 (1992); Stephanie D. Moussalli, CAMPAIGN FINANCE REFORM: THE CASE FOR DEREGULATION 4, 6 (1990); Janet M. Grenzske, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19-20 (1989); Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 Hofstra L. Rev. 369 377 (1989); Mary H. Vesenka, *Economic Interests and Ideological Conviction: A Note on PACs and Agriculture Acts*, 12 J. Econ. Behav. & Org. 259, 261-62 (1989); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 316 (1988); Larry Sabato, *Real and Imagined Corruption in Campaign Financing*, in ELECTIONS AMERICAN STYLE 155, 159-62 (A. James Reichley ed., 1987); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 Am. Pol. Sci. Rev. 400, 410-11 (1985); Chappell, *Campaign Contributions and Congressional Voting*, 62 Rev. Econ. & Stat. at 83.

[7] *See, e.g.*, Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of*

however, the scholarly community has been unable to come to any firm consensus as to whether contributions have a corrupting effect on official decision-making.

With respect to judicial elections, the evidence for influence is even weaker. Some early research, for example, found no difference between the decisions of judges who are appointed and those who are elected.[8] More recently, examination of contribution patterns for Supreme Court elections in Illinois, Michigan, and Wisconsin found that when large contributors came before the court as litigants, they were successful less than half the time. *See* Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2

Bias in Congressional Committees, 84 Am. Pol. Sci. Rev. 797 (1990); D. Magleby & C. Nelson, THE MONEY CHASE 78 (1990).

[8] *See, e.g.*, Beverly B. Cook, *Should We Change Our Method of Selecting Judges?*, 20 Judges J. 20, 22 (Fall 1981) ("Political science research suggests that judges define their roles and decide cases independently of the selection process used."); Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 Just. Sys.. J. 25, 39 (1979); Burton Atkins & Henry Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 Am. Pol. Q. 427, 440-48 (1974); R. Watson & R. Downing, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 343-48 (1969); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. Pub. L. 104, 117 (1964).

Elec. L. J. 79, 83-86 (2003). And even where a recent study claimed to find a correlation between campaign contributions and judicial decisions, its authors were ultimately forced to concede that "this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors' positions." Veron Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291, 1294 n.14 (2008).[9]

Finally, evidence of a corrupting effect from independent expenditures, as opposed to contributions, is virtually nonexistent. As this Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> Unlike contributions . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with

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[9] Aside from causation issues, the Palmer and Levendis study suffers from a number of methodological and other problems, which render its conclusions suspect. *See generally* Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 La. L. Rev. 281 (2009); Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 La. L. Rev. 307 (2009).

> the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Buckley, 424 U.S. at 47.

B. Campaign Spending Does Not Threaten Public Confidence in the Judiciary.

In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public. This threat, it is claimed, is particularly acute in the case of the judiciary because of its inherent weakness as a constitutional actor. As famously stated by Alexander Hamilton, the judiciary is the "least dangerous" branch, as it has "no influence over either the sword or the purse." The Federalist No. 78 (Alexander Hamilton), at 393-94. Because courts have neither the power to levy taxes nor command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice, rather than mere political actors. James L. Gibson, *Nastier, Nosier, Costlier – And Better*, Miller-McCune, August, 2008, at 27 ("Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with.").

Some degree of political cynicism or skepticism of government, however, need not be corrosive of public institutions, and in fact can have a salutary effect. Skepticism about the actions and motives of government officials can serve as a powerful check on the

abuse of government power, including judges. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar. Found. Res. J. 521, 527 (1977) (noting the "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."); *Bridges v. California*, 314 U.S. 252, 270-71 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."). And while some degree of perceived legitimacy is obviously necessary not only for the judicial but for other branches of government, experience has shown that democracy and skepticism about government institutions generally are capable of coexisting in the same society indefinitely.

Polling data consistently shows a generalized public skepticism about government institutions. For example, in surveys conducted since 1958 asking whether government officials were "crooked," between one quarter and one half of all respondents have indicated their belief that"quite a few of the people running the government are crooked." *See* The American National Election Studies Guide to Public Opinion and Electoral Behavior, Are Government Officials Crooked 1958-2004, *available at* www.electionstudies.org/nesguide/toptable/tab5_a.htm (in 2004, 35% of respondents thought "quite a few of the people running the government are crooked," while 53%

thought "not many" were crooked, and 10% said "hardly any" were crooked).

This long standing skepticism is likewise present in the public's attitudes regarding the influence of campaign contributions and independent expenditures on the judiciary. It would be a mistake, however, to equate this generalized skepticism about the role of money in politics with a lack of public confidence in the courts. Despite the concerns about campaign spending, public confidence in the judiciary remains high. A 2002 poll by the American Bar Association, for example, found that 72% of respondents were at least "somewhat concerned" about whether "the impartiality of judges is compromised by the need to raise campaign money to successfully run for office." Harris Interactive Telephone Survey, Prepared for the American Bar Association, August, 2002, attached as Exhibit 1. Yet the same poll found that 75% of respondents thought elected judges were more fair and impartial than appointed judges. *Id.*

Similarly, according to a recent poll, only 5 percent of respondents believed that campaign contributions made to judges had no influence at all on decisions judges made in Minnesota state courts. Decision Resources Ltd., *Justice at Stake Study, Minnesota Statewide,* Questions 9, 11 (January 2008), *available at http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf.* Nonetheless, the same poll found widespread public confidence in the courts, with 74% of respondents saying that they had "a great deal" or "some" confidence in the courts, and 76% saying that they had "a great deal" or "some" confidence in judges

(higher rates than for any other category except the medical profession). *Id.*

The courts are consistently among the highest ranked institutions in terms of public confidence. According to a 2001-2002 survey, 94% of respondents rated the job being done by courts and judges of their state as being either "excellent" or "good." Justice At Stake – State Judges Frequency Questionnaire, November 5, 2001 - January 2, 2002, attached as Exhibit 2. A 1999 survey found that 77% of respondents had either "a great deal" or "some" confidence in the United States Supreme Court, and 75% had similar confidence in local courts. National Center for State Courts - *How the Public Views the State Courts: A 1999 National Survey*, Table 1 (May 1999), attached as Exhibit 3. The same survey also found that 79% agreed with the statement that "[j]udges are generally honest and fair in deciding cases." *Id.* Figure 17. And while the majority of Americans will express some level of concern about the potentially corrupting effect of money in elections, this does not appear to be their most pressing political concern. *See 55% Say Media Bias Bigger Problem Than Campaign Cash*, Rasmussen Reports, August 11, 2008, *available at* http://-www.rasmussenreports.com/public_content/-politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash (55% of respondents thought media bias posed a bigger problem in politics than large campaign contributions).

As these data indicate, public confidence in the judiciary is robust. There is little evidence that public concerns about the influence of money on politics have

lowered public confidence in the courts, or that these concerns have impaired the ability of the courts to carry out the judicial function. Such concerns are therefore not an adequate basis for mandating recusal for campaign spending under due process.

C. Any Impartiality Concerns Raised by Campaign Spending are Inherent in the State's Decision to Hold Judicial Elections.

Federal courts have repeatedly held that where concerns about judicial impartiality arise out of ordinary campaign activities, the concerns are inherent in the state's decision to elect judges in the first place, and thus cannot be used as a basis for restricting these campaign activities. In *White*, for example, this Court struck down a Minnesota judicial canon which prohibited judicial candidates from announcing their views on disputed legal or political issues. *White*, 536 U.S. at 788. Quoting Justice Marshall, the Court stated that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* (*quoting Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). As Justice O'Connor elaborated in her *White* concurrence:

> Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling.

> If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

White, 536 U.S. at 792 (O'Connor, J., concurring).

Similarly, in *Weaver* the Eleventh Circuit struck down a state judicial canon barring judges and judicial candidates from personally soliciting campaign contributions. The *Weaver* court followed *White* in holding that any impartiality concerns raised by the personal solicitation of campaign funds were inherent in the state's decision to elect judges, and thus could not be used as a rationale to limit candidates' First Amendment rights. *See Weaver*, 309 F.3d at 1322 ("The impartiality concerns, if any, are created by the State's decision to elect judges publicly"). Because private financing is such a pervasive feature of state judicial elections, any attempt to require recusal based on campaign spending can only result in a limitation on the states' ability to choose their method of judicial selection.

III. Mandatory Recusal Based on Campaign Spending Would Harm Judicial Impartiality.

A. Mandatory Recusal Based on Campaign Spending Would Exponentially Increase Recusal Motions.

Far from preserving judicial impartiality, mandating recusal based on campaign spending has the potential to impede the swift execution of justice and undermine public confidence in the judiciary. Because of the nebulous nature of Petitioners' proposed standard, requiring recusal based on substantial campaign

spending can only serve to vastly increase the number of recusal requests brought before the court. If recusal is granted in even a significant fraction of these cases, this would not only cause hardship for both litigants and judges, but would also serve to bring the judiciary itself into disrepute. *See Feichtinger v. State*, 779 P.2d 344, 348 (Alaska Ct. App. 1989) (noting that while judges may sometimes be tempted to recuse in order to avoid controversy, "[t]o surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage."); *Adair v. Mich. Dep't of Educ.*, 709 N.W.2d 567, 579 (Mich. 2006) ("Each unnecessary recusal adversely affects the functioning of the Court").

On the other hand, if a judge denies a recusal request based on campaign spending, then the issue of whether the denial violated due process will have to be litigated on appeal. Even otherwise routine cases will take on a constitutional dimension, as one party argues that the level of campaign spending involved in the case warranted the judge's recusal. This will not only clog the courts, and especially the federal courts, with recusal related litigation, but because the recusal issue involves questions about a judge's integrity and capacity to overcome potential threats to his impartiality, requiring judges to evaluate the recusal decisions of their fellow judges can only add strains to the collegiality between judges essential for the smooth operation of the justice system.

In the minds of the public, requiring a judge to recuse himself in certain circumstances is tantamount to a declaration that the judge is incapable of being impartial, at least in those circumstances. Any rule,

therefore, that would require judges to recuse in a significant number of cases—or which would lead to an exponential increase in the number of cases where recusal was requested but denied—has the potential of leaving the public with the impression that judges are generally corrupt or incapable of rendering justice dispassionately and fairly.

B. Mandatory Recusal Based on Campaign Spending Would Leave Judges Vulnerable to Strategic Recusal Requests.

Requiring recusal based on campaign spending leaves judges vulnerable to strategic action by potential parties and their attorneys. *See* Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 72 (2005) (noting that while "the subject of strategic recusal . . . is not often discussed, no doubt because the goal seems unfair and perhaps unethical . . . you can be sure that strategic recusals do occur").

As noted above, those who spend money on a candidate's behalf fall into two groups. They may be spending on the candidate's behalf because they believe she shares their values and views, or they may be spending in an attempt to influence the candidate's views. Under the current system, those who simply wish to elect candidates who they believe share their values or views can donate to that candidate, or make independent expenditures on their behalf, though with no guarantee that the candidate they support will actually win.

A party who wishes to influence the views of a judge, by contrast, faces not only this uncertainty, but

also the prospect that his spending will fail to improperly influence the judge as he wishes. He can donate to a judicial candidate, but this is no guarantee that the candidate he backs will be elected, let alone that the candidate will rule in his favor as judge. A litigant who pursues this strategy also has to worry that he will be out-bid by another party pursuing the same strategy.

Mandating recusal based on campaign spending would ironically make it far easier for parties to influence the outcome of their litigation. Instead of worrying about whether a judge will change his vote in a case based on a given contribution or independent expenditure, a party can simply contribute to the campaigns of judges he believes are likely to rule against him, thus ensuring that these judges cannot hear his case. As then Judge Breyer wrote in *In re Allied-Signal Inc.*, 891 F.2d 967 (1st Cir. 1989), the standards governing recusal "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *Allied-Signal*, 891 F.2d at 970.

While mandating recusal based on campaign spending would not impede those who wish to use spending as a means of influencing a judge's vote, it would impede those who wish to spend on behalf of a candidate because they believe she shares their values and views. An individual who wishes to support a candidate out of a sense of shared judicial philosophy may be less likely to do so if he knows that doing so will require the judge's recusal. Mandatory recusal in

these circumstances thus has the potential to chill individuals from making independent expenditures on behalf of candidates, or from getting involved in the political process. *Cf. Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (invalidating a Minnesota public funding scheme because of the chilling effect it had on independent expenditures).

Nor is the risk of strategic recusal requests avoided simply by mandating recusal only in cases where spending is "substantial." If a party or attorney is willing to spend large amounts of money on behalf of a candidate in the hopes that this candidate will vote in accordance with his interests if elected, then there is no reason why he would not be willing to spend an equal amount of money on behalf of a candidate in order to secure his disqualification.

Conclusion

For the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
BOPP, COLESON & BOSTROM
THE JAMES MADISON CENTER
FOR FREE SPEECH
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)

Exhibit 1

Harris Interactive Telephone Survey, Prepared for the American Bar Association, August, 2002

A Study About Judicial Impartiality

Prepared for

The American Bar Association

August 2002

Harris Heritage. Interactive Power.

www.harrisinteractive.com

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Background and Methodology

Harris Interactive conducted an omnibus study on behalf of the American Bar Association. A nationally representative sample of 1,040 Americans ages 18 or older were interviewed by telephone using an unrestricted Random Digit Dialing (RDD) technique that significantly reduces serial bias and ensures that respondents with both listed and unlisted numbers are reached. Only one interview was conducted per household.

Interviews were conducted August 2, 2002 to August 5, 2002.

To ensure a reliable and accurate representation of the total national adult population, completed interviews were weighted to known proportions for age, gender, geographic region, and race. The margin of error for the total sample is ± 3.1%.

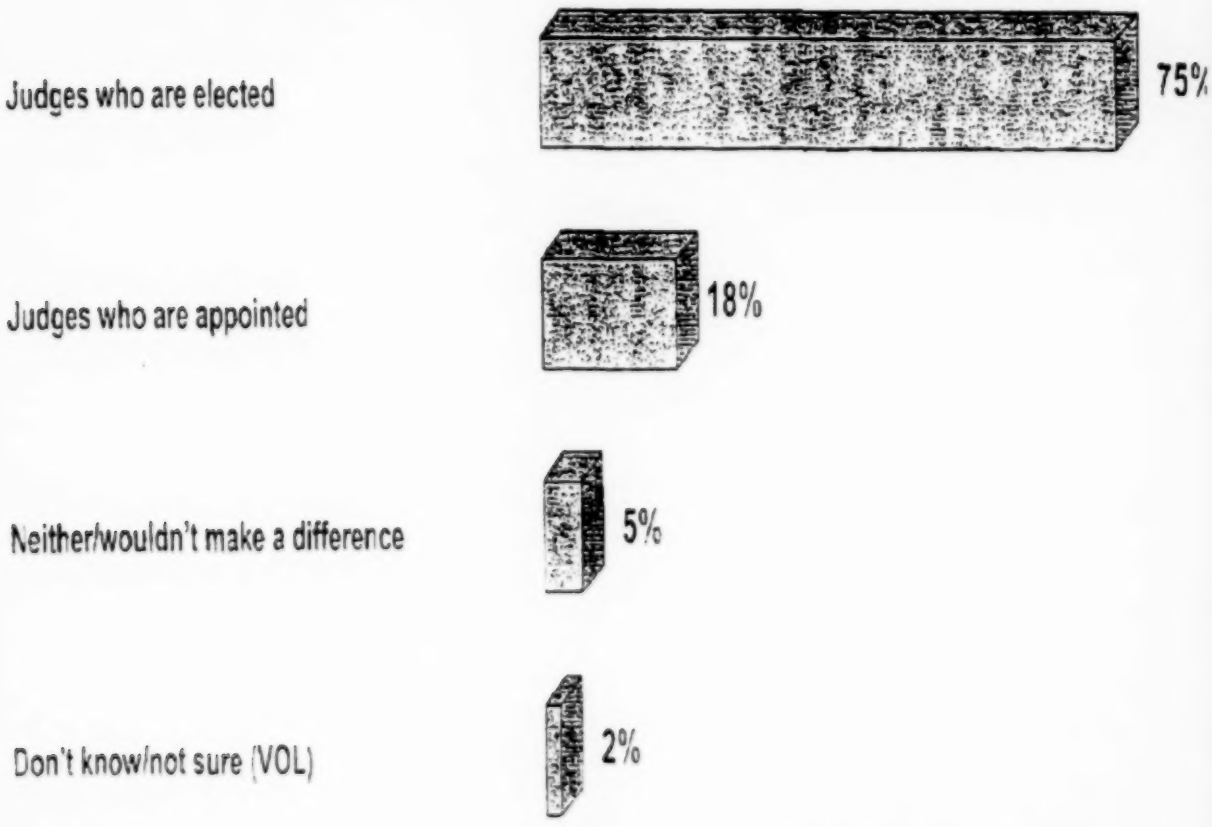
Detailed Findings

Elections and Judicial Impartiality

Americans have more confidence in democratically-elected judges than they do for appointed jurists.

- Three out of four (75%) Americans believe that judges who are elected are more fai and impartial than those who are appointed.

Which of the following would you think is more fair and impartial?

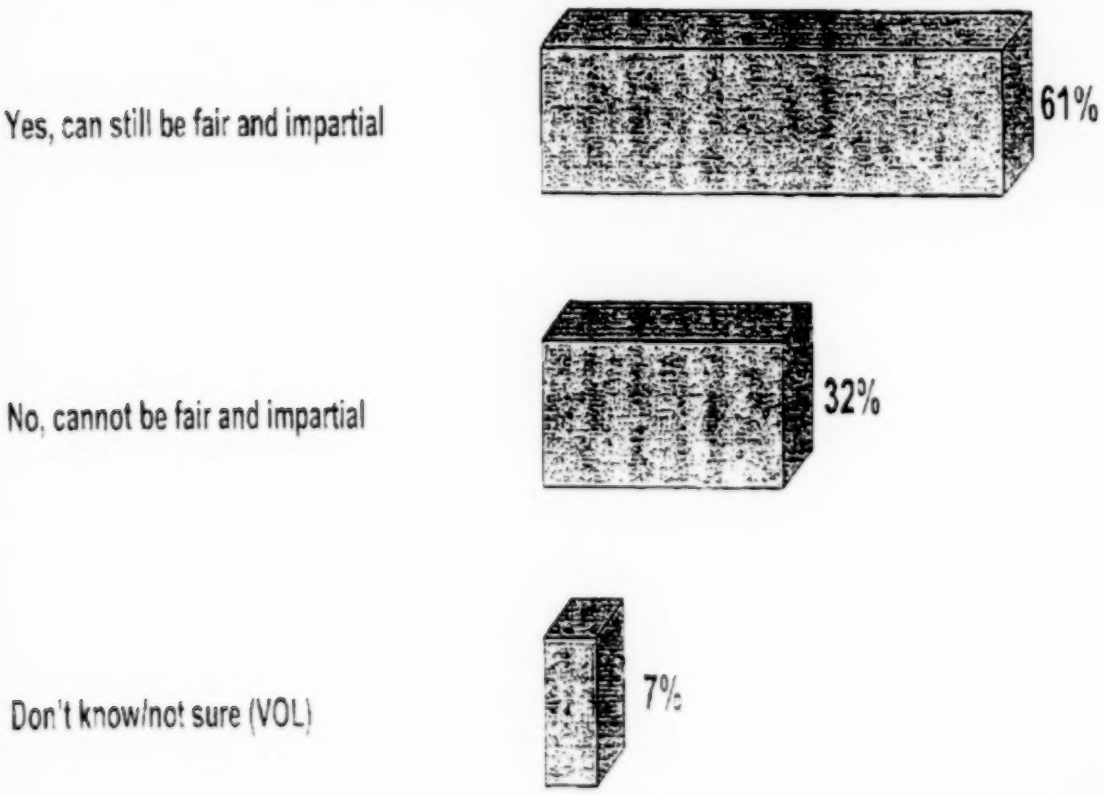


Political Opinions and Judicial Impartiality

Americans believe that voicing political opinions does not later render a judge partial to those opinions.

- **Three in five (61%) Americans believe that someone who voices political opinions can later be a fair and impartial jurist.**

Do you believe that someone who voices opinions about legal and political issues can later be a fair and impartial judge about those same issues?



Fundraising and Campaigning

Americans are concerned about the effect campaign fundraising has on an elected judge's fairness and impartiality.

- Nearly three out of four (72%) Americans are at least somewhat concerned about the fairness and impartiality of elected judges who raise money to finance campaigns.

In states where judges are elected, candidates must raise money to finance their campaigns. How concerned are yo that the impartiality of judges is compromised by the need to raise campaign money to successfully run for office?

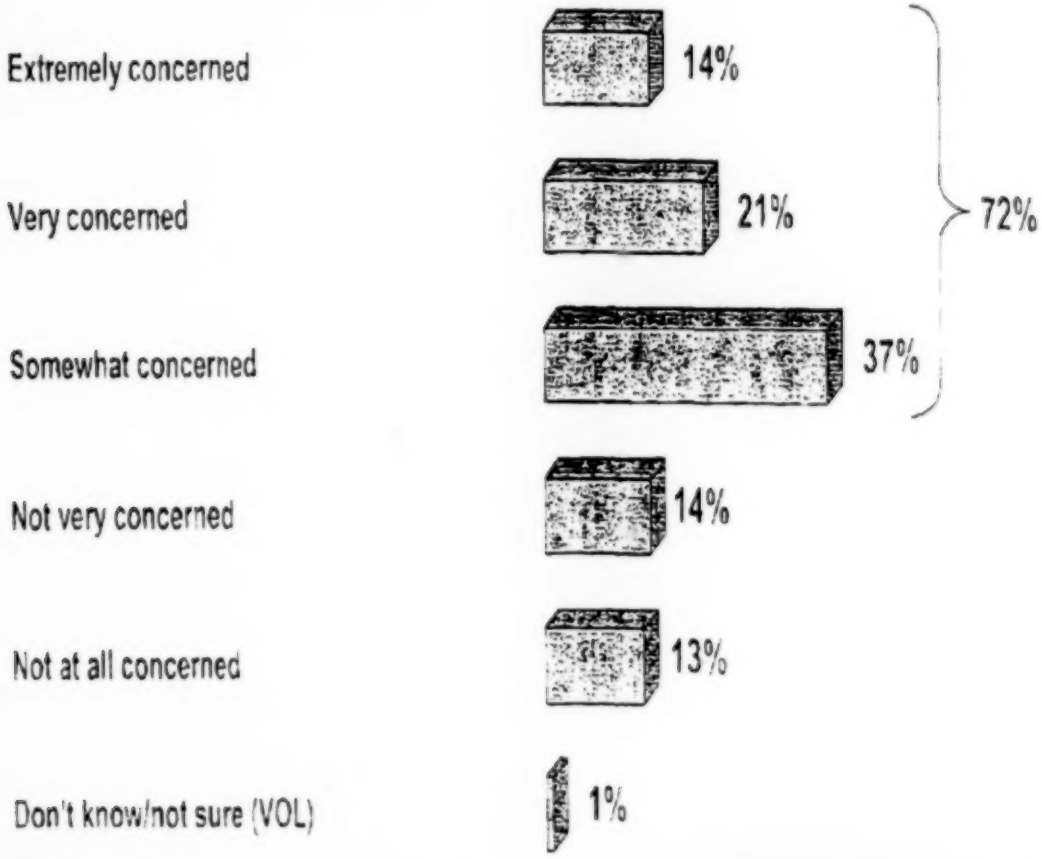


Exhibit 2

Justice At Stake - State Judges Frequency Questionnaire, Nouember5,2001-January 2, 2002

[LOGO] **Justice at Stake**
campaign

GREENBERG QUINLAN ROSNER RESEARCH INC [LOGO] AMERICANVIEWPOINT

November 5, 2001-January 2, 2002
2428 Respondents, 1943 Weighted
188 Supreme Court
527 Appellate Court
1713 Lower Courts

JUSTICE AT STAKE – STATE JUDGES FREQUENCY QUESTIONNAIRE

Q.1 How would you rate the job being done by courts and judges in your state?

	Supreme	Appeals	Lower	Total
Excellent.....	39	35	35	35
Good	57	58	59	60
Just fair.....	4	7	4	4
Poor	-	0	0	0
Don't know....	-	0	1	1
(Blank)	1	0	0	0
Excellent/ good	**96**	**93**	**95**	**94**
Fair/poor	**4**	**7**	**4**	**5**
Exc/Good – Fair/poor	**92**	**86**	**90**	**90**

(ref:SATISFAC)

Q.2 How do you think appellate judges should be selected in your state?

	Supreme	Appeals	Lower	Total
Merit selection followed by retention election.....	51	49	53	52
Non-partisan popular election	19	19	18	19
Appointment by the governor with legislative confirmation...	16	9	10	10
Appointment by the governor without legislative confirmation	4	8	8	8
Partisan popular election	3	11	6	7
Legislative appointment or election	5	2	2	2
Don't know.....	1	2	1	1
(Blank)	2	1	1	1

(ref:SELEC)

Exhibit 3

National Center for State Courts - How the Public Views the State Courts: A 1999 National Survey

HOW THE PUBLIC VIEWS THE STATE COURT

A 1999 NATIONAL SURVEY

BY THE

NATIONAL CENTER FOR STATE COURTS

FUNDED BY

THE HEARST CORPORATION

INTERVIEWS CONDUCTED BY
Indiana University
Public Opinion Laboratory
SURVEY DESIGNED AND
ANALYZED IN COLLABORATION WITH
University of Nebraska Public Policy Center
and Scientific Resources for the Law, Inc.

PRESENTED AT
The National Conference on
Public Trust and Confidence in the Justice System
May 14, 1999, Washington, DC

FINDINGS

The first section of this report considers how the public views the state courts in terms of trust and confidence in the courts of their communities and how that compared to their views of other important public institutions and the job that courts do in handling various kinds of cases. The second section looks at experience with the courts, people's self-rated knowledge about the courts and the sources of information people use to get the news generally and information about the courts specifically. The third

section represents the public's report card on the performance of the courts in their communities. Overall performance ratings are discussed first, followed by a focus on the key arenas of access to the courts, the timeliness of courts, the equality and fairness of the courts and, finally, the independence and responsiveness of the courts.

TRUST, CONFIDENCE AND APPROVAL

Public Trust and Confidence in America's Institutions

Overall, people have a good deal of confidence in American institutions. (See Table 1)[1]

The results reveal that 50% or more of the public have a "Great Deal" or "Some" trust and confidence in America's institutions. However, depending on the institution being rated, there is a marked range in the percentage of the public that has a "Great Deal" of trust and confidence. Almost half of the sample indicated a great deal of trust and confidence in the medical profession. Nearly the same proportion indicated a great deal of trust and confidence in the local police. On the other hand, only about one in five Americans indicated a great deal of trust and confidence in their state legislature, and only one in ten

---

[1] Fifty percent of those surveyed were asked about their "confidence," and 50% were asked about "trust." The differences between the groups were not statistically significant, and the data have been combined in this report.

indicated a great deal of trust in the media. The courts (U.S. Supreme Court and the courts in the respondent's community) fall somewhere in the middle of America's public institutions.

Table 1: Trust and confidence in American institutions

	AMOUNT OF TRUST/CONFIDENCE			
INSTITUTION*	Great Deal	Some	Only a Little	None
Medical Profession	45%	42%	10%	3%
Local Police	43%	39%	12%	6%
U.S. Supreme Court	32%	45%	17%	6%
Office of the Governor	30%	47%	16%	8%
Public Schools	26%	49%	20%	5%
Courts in Your Community	23%	52%	17%	8%
State's Legislature	18%	58%	17%	7%
Media	10%	40%	31%	19%

*ranked in order of "Great Deal" of confidence

- Confidence in public institutions appears to vary systematically across racial groups with race being a significant predictor of confidence in each institution after controlling for education and income.

In comparison to Whites/Non-Hispanics, African-Americans expressed lower levels of confidence in public schools, the office of the governor, police, their state's legislature, the U.S. Supreme Court and courts in their community. In contrast, compared to Whites/Non-Hispanics, Hispanics expressed greater levels [sic] confidence in their state's legislature and the U.S. Supreme Court.

- Confidence in local police and in the U. S. Supreme Court is associated with confidence in the courts in the community.

- Income level was independently predictive of confidence in public institutions, with increased income associated with increased confidence in the public schools, the office of the governor, the police and the U.S. Supreme Court.

Those respondents with higher incomes and higher levels of education had greater trust and confidence in most of the public institutions surveyed.

AMICUS CURIAE BRIEF

No. 08-22

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

Brief of Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System, League of Women Voters, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed Center for Law & Justice, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts, Illinois Campaign for Political Reform, Justice For All, League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed Center for Law & Justice, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education, Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appellate Lawyers Association, Washington Appleseed, Wisconsin Democracy Campaign, Chicago Appleseed, and Chicago Council of Lawyers as *Amici Curiae* in Support of Petitioners

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA *
CONSTITUTIONAL ACCOUNTABILITY CENTER
1301 Connecticut Ave., N.W., Suite 502
Washington, D.C. 20036
(202) 296-6889
Counsel for *Amici Curiae*

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICI CURIAE[1]

Amici curiae respectfully submit this brief to the Court to demonstrate and explain the interaction between the constitutional question presented to the Court in this case and the policy issues currently being addressed by state judicial selection reform efforts.

The twenty-eight *amici* represented on this brief are national, state, and local organizations committed to preserving judicial independence and integrity: Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System at the University of Denver, League of Women Voters of the United States, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts (New York), Illinois Campaign for Political Reform, Justice For All (Arizona), League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education,

---

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appleseed, Washington Appellate Lawyers Association, Wisconsin Democracy Campaign, Chicago Appleseed, and the Chicago Council of Lawyers.

A description of each *amicus* organization may be found in the Appendix to this brief.

SUMMARY OF ARGUMENT

This case presents concerns about judicial elections that fall on both sides of "the distinction between constitutionality and wise policy," *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008) (Stevens, J., concurring). While the Court will surely be mindful in this case, as it has been in the past, of the questions of "wise policy" raised by the current state of judicial elections, it need not be concerned that its constitutional ruling requires the Court to take positions on policy. Rather, as the Court has routinely stated, its role is to set the minimum level of process required by the Fourteenth Amendment, while the role of the states is to promulgate appropriate procedures and rules that further define and build upon the Court's articulation of the constitutional floor. *See Smith v. Robbins*, 528 U.S. 259, 274-75 (2000).

If the Court finds, as Petitioners and *amici* urge, that the facts of this case rise to the level of a due process violation, state reform efforts will work within the contours of the Court's constitutional ruling to find solutions to the questions of "wise

policy" raised by the serious threats to judicial impartiality posed by judicial campaigns and elections. On the other hand, if the Court does not find that the egregious facts of this case rise to the level of a due process violation, state reform efforts will be weakened by the Court's acceptance of the perceived and actual threats to judicial impartiality posed by high levels of campaign contributions to judicial candidates.

The history of due process and judicial independence in the United States supports the proposition that the Constitution must be used to preserve fundamental fairness and the perception and reality of impartial justice. The Court should follow the long line of precedent that holds that due process requires judges to "hold the balance nice, clear, and true," *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Court's constitutional ruling in this case, compelled by history and precedent, will encourage states to reform judicial selection in general and improve recusal provisions in particular.

ARGUMENT

I. THE HISTORY OF THE DUE PROCESS CLAUSE SHOWS A PARTICULAR CONCERN FOR ENSURING UNBIASED DECISIONMAKERS.

From the English common law through the guarantees of due process in the Fifth and Fourteenth Amendments of the U.S. Constitution, a fair and impartial judiciary has been an indispensable feature of democracy. *See* U.S.

CONST. amend. V, XIV. The judicial insistence on unbiased adjudicators goes back at least as far as the early seventeenth century common law, *see Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610), and was invoked by the American Founders, *see* THE FEDERALIST No. 10, at 47 (James Madison) (Clinton Rossiter ed., 1999) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity.").

Securing impartial justice was of particular concern to the drafters of the Fourteenth Amendment's Due Process Clause, who acted against the backdrop of widespread maladministration of justice in the South, whereby neither freed slaves nor Unionists could be sure of due process in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (remarks of Rep. Bingham), 1263 (remarks of Rep. Broomall) (1866); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (remarks of Sen. Trumbull) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty or property."). The drafters of the Fourteenth Amendment were also keenly aware of the particular injustices wrought by the Fugitive Slave Act in the North. Under the federal Fugitive Slave Act of 1850, the commissioner who decided whether the person brought before him was a fugitive slave received $10 for returning a purported slave, but only $5 for declaring him free. *See* Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850); Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) (remarks of Sen. Sumner)

("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him to freedom, his dole is $5."); Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) (remarks of Rep. Bingham) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power...to irresponsible commissioners...tendering them a bribe of five dollars if...he shall adjudge a man brought before him on his warrant a fugitive slave"); *see generally* Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 40 (1986).

The "controversy over fugitive-slave rendition had heightened abolitionists' sensitivity to fair procedure," because the Fugitive Slave Act deprived black defendants of basic fair-trial rights, including "an unbiased decision-maker." Akhil Reed Amar, THE BILL OF RIGHTS 278 (1998); *see also* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850"). Accordingly, Representative Bingham, principal drafter of Section 1 of the Fourteenth Amendment, intended the Amendment to secure "due process of law...which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court has applied the Due Process Clause to guarantee the impartial adjudicators the framers of the Fourteenth Amendment found lacking in

some Civil War-era courts. In *Tumey v. Ohio*, the Court held that the due process guarantee of the Fourteenth Amendment is violated when a judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [a litigant]." 273 U.S. 510, 523 (1927). After an exposition of the common law history of due process, the *Tumey* Court stated the rule that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Id.* at 532.

Since *Tumey*, the Court has continued to protect the Fourteenth Amendment "right to have an impartial judge," *id.* at 535, by preventing judges from presiding over cases in which they have a financial stake or are otherwise not wholly disinterested in the outcome. *See In re Murchison*, 349 U.S. 133, 136 (1955) (finding that a judge may not act as a grand jury and then try the person so indicted because the guarantee of a "fair trial in a fair tribunal" requires not just "an absence of actual bias in the trial of cases" but also endeavors "to prevent even the probability of unfairness"); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding that a petitioner was denied an impartial adjudicator where the mayor, who served as judicial officer, was arguably interested in increasing court fines and forfeitures because these amounts provided a substantial portion of village funds); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813

(1986) (invalidating a ruling written by an Alabama State Supreme Court justice who had a personal interest in the resolution of a dispositive issue, noting that it was unnecessary to determine whether the judge was actually biased, since "justice must satisfy the appearance of justice") (citation omitted). *See generally* Pet. Br. at 19-24 (discussing relevant precedent at length); Brennan Ctr. Br. at I.A. (discussing current state judicial election patterns that implicate fundamental fairness concerns). The *Ward* case, in particular, shows that a decision-maker need not be tempted to line his own pockets to be deemed biased under due process analysis; rather, a less direct financial incentive, like continued campaign contributions or enhanced professional position, may count as a pecuniary interest and suffice to deny a party her constitutional right to "a neutral and detached judge." *Ward*, 409 U.S. at 62.

This precedent, and the history of the Due Process Clause, require that the Court find that judicial campaign contributions can, in certain circumstances, create the reality or appearance of judicial bias in violation of the Due Process Clause. The extraordinary facts of this case provide a clear opportunity for the Court to set a constitutional floor for judicial campaign contributions and the requirements of due process.

II. A CONSTITUTIONAL RULING IN THIS CASE WILL ENCOURAGE STATE JUDICIAL SELECTION REFORM EFFORTS TO FURTHER DEFINE AND PREVENT THREATS TO JUDICIAL IMPARTIALITY.

History shows that the Due Process Clause should be applied in this case to protect both the reality and appearance of judicial impartiality and fundamental procedural fairness. History also suggests that, with this Court's guidance firmly in hand, state reformers will work with legislatures and courts to fill in the contours of the Court's ruling, refining how due process and recusal will interact in the context of an elected judiciary. Just as in the federal context recusal statutes provide such strenuous review of judicial activity that some commentators have deemed due process challenges to be "superfluous," *see* Jay Hall, *The Road Less Traveled: The Third Circuit's Preservation of Judicial Impartiality in an Imperfect World*, 50 VILLANOVA L. REV. 1265, 1266 n.8 (2005), the current judicial selection reform movement in the states shows that there are efforts in place to build upon any due process floor articulated by the Court in this case.

State judicial elections first arose in the early nineteenth century as efforts to make courts more democratic and accountable. At the time the Fourteenth Amendment was drafted and ratified, the majority of states elected judges to some degree. *See* Larry C. Berkson, *Judicial Selection in*

the United States: A Special Report 1 (1980) (updated by Rachel Caufield in 2004), available at http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf (noting that, by the time of the Civil War, 24 of 34 states had established an elected judiciary; as new states were admitted to the Union, all of them adopted popular election of some or all judges until the admission of Alaska in 1959). But as this case shows, the promise of popular judicial elections has led, in some cases at least, to a perception that justice is for sale, as campaign contributions increase exponentially and public confidence in the system wanes. This Court should recognize that there are circumstances—like those presented in this case—under which the threats to judicial independence and impartiality posed by judicial elections can threaten constitutionally-required due process. Such a ruling will guide and inspire current state reformers to enact policies designed to restore the appearance and reality of equal justice and judicial independence.

A. The Court Has Expressed Its View That Its Role Is To Set Constitutional Requirements And The Role Of The States Is To Enact Policy That Fulfills And Furthers These Constitutional Requirements.

The interaction between state judicial election reform efforts and the due process "floor" Petitioners and *amici* advocate for in this case fits within the Court's view of its role not as "rule-making organ for the promulgation of state rules,"

Spencer v. Texas, 385 U.S. 554, 564 (1967), *quoted in Smith v. Robbins*, 528 U.S. 259, 274 (2000), but as the arbiter of "whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate," *id.* The Court has suggested a dynamic relationship between the states and the Court that is well-suited to this case: states are encouraged to enact standards that effectuate and perhaps go beyond a constitutional due process minimum identified by the Court in a particular case. As Justice Thomas wrote in *Smith*, "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us, while leaving the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance." 528 U.S. at 275 (citation and quotation marks omitted).

Accordingly, the Court may "avoid imposing a single solution on the States from the top down," *Smith*, 528 U.S. at 275, by setting the due process floor in this case. This would, in turn, encourage the state reform efforts detailed by *amici* to build upon that floor by further defining the circumstances under which recusal is required or by addressing the problematic aspects of judicial elections that give rise to such threats to judicial independence in the first place.

B. Current State Reform Efforts Will Give Effect To The Court's Due Process Ruling.

Heeding the call to engagement expressed in Justice Kennedy's concurrences in *Lopez Torres*, 128 S. Ct. at 803, and *Republican Party v. White*, 536 U.S. 765, 794 (2002), state efforts are already underway to reform judicial elections in general and improve recusal provisions in particular. While most flaws in the judicial election process do not rise to the level of a constitutional violation, the problems attendant to judicial elections have become so serious and immediate that a national movement, of which many *amici* are a part, has been formed to reform state judicial selection.

Judicial elections have created a crisis of public confidence. National surveys from 2001 and 2004 found that over 70% of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom.[2] *See generally* Brennan Ctr. Br. at I.B (describing the perception and reality of bias occasioned by campaign contributions in judicial elections). Taking just one state as an example, retired Justice Sandra Day O'Connor has highlighted that "[n]ine out of 10 Pennsylvanians regard judicial

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[2] *See* Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 4 (2001), available at http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf; Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004), available at http://www.faircourts.org/files/zogbypollfactsheet.pdf.

fundraising as evidence that justice is for sale, and many judges agree." Sandra Day O'Connor, *Justice for Sale: How Special-interest Money Threatens the Integrity of Our Courts*, THE WALL ST. JOURNAL, A25 (Nov. 15, 2007). Unsurprisingly, but unfortunately, this perception of the influence of judicial campaign contributions causes the public to question whether equal justice under the laws is a reality and not merely an aspiration: according to a 2001 poll, just 33% of those surveyed believed that "the justice system in the U.S. works equally for all citizens," and 62% believed that "[t]here are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else."[3] *See* Sample, *supra*, at 10-11. Even worse, studies suggest that this perception of bias may actually reflect reality.[4]

A due process ruling by the Court in this case would draw a constitutional line at a particularly egregious set of facts; state reform efforts will then give effect to this ruling across a broader spectrum. Within constitutional limits, states have a significant amount of discretion to carry out constitutional mandates. *See Pennsylvania v.*

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[3] Greenberg Quinlan, *supra* note 2, at 7.

[4] *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (reviewing 12 years of Ohio Supreme Court decisions and finding that justices ruled in favor of campaign contributors between 55% to 91% of the time); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), available at http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf (showing that the average petitioner who contributed $250,000 or more to the Texas Supreme Court's campaigns was 10 times more likely than the average non-contributor to have a petition for discretionary review granted).

Finley, 481 U.S. 551, 555-59 (1987) (describing the Court's constitutional ruling in that case as setting a prophylactic framework that could adequately vindicate due process rights, while explaining that states have "substantial discretion to develop and implement programs" within that framework). In the context of judicial elections, reform advocates have proposed a variety of measures to restore public confidence and protect judicial independence; the following examples[5] suggest several ways that a constitutional ruling in this case could be furthered in the states.

Recusal Standards. The Court's constitutional ruling in this case could have a significant effect on reform of recusal standards. Currently, the rate of recusal because of campaign contributions is incredibly low. *See* Testimony of Pennsylvanians for Modern Courts on Pennsylvania House Bill No. 1720, submitted by Shira J. Goodman and Lynn A. Marks (Aug. 13, 2007); *see also* Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead the Recusal Revolution*, 46 WASHBURN L.J. 503 (2007). The American Bar Association has recently proposed a model code provision that would allow each state to fill in the blanks in the proposed code provision to require recusal

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[5] There are many more reform efforts underway in the states, including movements to increase voter education, create campaign conduct oversight committees, transition from partisan to non-partisan elections, and implement judicial performance evaluation processes; a full description of the panoply of reform efforts is beyond the scope and space of this brief. *See generally* Justice at Stake Campaign, http://www.faircourts.org/ (providing information about reform partners and projects).

whenever campaign contributions reach a particular level, within a specified time-frame. *See* ABA Model Code of Conduct, Canon 3E(1)(E). Reform movements are calling upon states to consider adopting some version of the ABA model provision; two states have already done so. *See* James Sample et al., *Fair Courts: Setting Recusal Standards* (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/. If the Court draws a constitutional line, even in an extreme case, it will be clear that at least at some point judges must recuse themselves from cases involving campaign contributors. With this starting point, states will be encouraged to consider provisions like the model canon proposed by the ABA to define for themselves the circumstances giving rise to campaign-related recusal.

Public Financing. Within a contested election system, "[p]ublic financing can help mitigate the worst side-effects of high-cost judicial elections, while still leaving the final decision in the hands of the voters." James Sample et al., *The New Politics of Judicial Elections 2006* 39 (2006), available at http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf. In 2007, New Mexico became the second state to provide full public financing for judicial elections; North Carolina was the first, having offered voluntary funding to qualified candidates for its Supreme Court and Court of Appeals since 2004. *Id.* at 39-40. The North Carolina program has documented success: in 2004, 14 of 16 candidates enrolled in the state's trial run of the program; in 2006, eight of 12

candidates opted to limit their fundraising in exchange for public funds; and in 2008, 11 of 12 high court candidates opted into the system. *See id.* With the public financing system in place, candidates collected smaller contributions from more donors and 53% of all donations came from public funds or contributions of less than $100. The program has also been a success with the public: a 2005 poll found that 74% of North Carolina voters approved continuing the public financing system. *Id.*

Merit Selection. In many states, reform advocates have sought to move away from partisan, contested elections altogether in favor of appointment-based or "merit-selection" systems. Under a merit-selection system, a nominating commission evaluates judicial applicants and sends the names of the best-qualified candidates to the state governor. The governor then appoints one of the nominees submitted by the commission; in some states, the state senate confirms the nominated judges, and, in most systems, these appointed judges will eventually stand for a retention election. Several states already use a merit-based selection process exclusively, and many states use some mix of an appointment system and elections. *See* Judicial Selection in the States: How It Works, Why It Matters (American Judicature Society & Institute for the Advancement of the American Legal System, 2008), available at http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf. The American Judicature Society has published Model Judicial Selection Provisions to

offer states "exemplary language for establishing judicial nomination and evaluation processes of the highest quality." Malia Reddick, *Preface to the 2008 Revision*, MODEL JUDICIAL SELECTION PROVISIONS (American Judicature Society, 2008).

All of these reform efforts aim to preserve judicial accountability, while removing undue special interest influence and restoring public confidence in and respect for state judiciaries. Most importantly, all of these proposed reforms will provide a due process "buffer zone," ensuring that state judicial selection systems do not approach the limits of the Fourteenth Amendment's guarantee of an unbiased decisionmaker in courts of justice.

C. State Reform Efforts Will Likely Be Weakened If The Court Tolerates The Substantial Risk Of Actual Bias Presented By The Facts Of This Case.

While it is likely that a ruling in favor of Petitioners will have the effect of encouraging state judicial selection reform, it may also be that a contrary ruling will discourage such efforts. If the Court does not find a due process violation under the facts of this case, state reform efforts may be weakened or even overcome by the Court's implicit acceptance of the perceived and real threats to judicial impartiality raised by substantial campaign contributions like the ones in this case.

While there are many examples of threats to judicial independence posed by state judicial elections, *see* Brennan Ctr. Br. at Section I, the

facts of this case are extraordinary. Don Blankenship, chairman, CEO, and president of A.T. Massey Coal Co., spent $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals. Those remarkable expenditures represented more than 60% of the total amount spent in support of Justice Benjamin's candidacy; Blankenship spent this money in support of Justice Benjamin while Massey was preparing to appeal a $50 million fraud verdict to the West Virginia Supreme Court of Appeals. *See* Pet. Br. at 3-15 (describing the facts of the case in detail). Justice Benjamin's decision not to recuse himself from Massey's appeal—despite the staggering amount of Blankenship's campaign expenditures and the timing of those contributions in relation to Massey's appeal—creates an undeniable appearance of impropriety, if not evidence of an actual bias.

For the Court not to recognize a due process violation under these circumstances would send a message that concerns about judicial elections are not so serious as to pose a threat to the independent judicial system our Constitution requires. Such a ruling would constitute a significant setback for the state judicial selection reform movement, which is premised on the idea that judicial elections and campaign contributions can, in some cases, threaten the appearance or reality of impartial justice. A ruling by the Court that the facts of even this case do not present a constitutionally significant threat to equal justice

would significantly undermine this premise, and weaken state reform efforts.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse Justice Benjamin's decision not to recuse himself, vacate the judgment of the Supreme Court of Appeals of West Virginia, and remand for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1301 Connecticut Ave., N.W.
Suite 502
Washington, D.C. 20036
(202) 296-6889

JANUARY 5, 2009 *Counsel for Amici Curiae*

APPENDIX

APPENDIX

LIST OF *AMICI CURIAE* ORGANIZATIONS

JUSTICE AT STAKE is a non-partisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake Campaign partners educate the public and work for reforms to keep special interest pressure out of the courtroom.*

AMERICAN JUDICATURE SOCIETY works to maintain the independence and integrity of the courts and increase public understanding of the justice system. Founded in 1913, the society is a non-partisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. Its mission is to secure and promote an independent and qualified judiciary and fair system of justice.

APPLESEED is a non-profit network of public interest justice centers and professionals dedicated to building a just society through legal, legislative and market-based structural reform.

COMMON CAUSE is one of the nation's oldest and largest citizen advocacy organizations, with organizations in 35 states, and nearly 400,000

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* The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

members and activists around the country. Common Cause is a strong proponent of a fair and impartial judiciary, and supports reform initiatives for judicial election, selection, and retention that eliminate the undue influence of special interest money on the judiciary. Common Cause seeks such reforms through state chapters in many states, including Georgia, Ohio, Pennsylvania, and Wisconsin.

CONSTITUTIONAL ACCOUNTABILITY CENTER is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history, including preserving access to equal justice and impartial courts.

The INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM AT THE UNIVERSITY OF DENVER is a national, non-partisan organization, dedicated to improving the process and culture of the U.S. civil justice system.

The LEAGUE OF WOMEN VOTERS OF THE UNITED STATES is a non-partisan political organization that, since 1920, has encouraged informed and active participation in government, worked to increase understanding of major public policy issues, and sought to influence public policy through education and advocacy.

The NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT is an independent entity established to promote the use of judicial campaign oversight committees.

ALABAMA APPLESEED CENTER FOR LAW AND JUSTICE, INC. is one of a network of 15 independent public interest justice centers that seeks to identify root causes of injustice and inequality, and then to fashion systemic solutions that benefit all Alabamians. Alabama Appleseed is a tax-exempt, non-partisan group of pro bono lawyers who have identified the massive amounts of private donations to all of Alabama's judges, elected by partisan elections – some $13 million for contested Supreme Court seats in 2006 – as gravely undermining the public's belief that justice in Alabama is blind.

The COLORADO JUDICIAL INSTITUTE is a 29-year old non-partisan, non-profit organization that seeks to preserve and enhance the independence and excellence of Colorado courts, further public understanding of the Colorado judicial system, and ensure that the courts meet the needs of the people.

DEMOCRACY NORTH CAROLINA is a non-partisan organization that uses research, organizing, coalition-building, and public education to enhance the vitality of democracy in North Carolina and help fulfill the promise of "one person, one vote." It was a major leader in the successful effort to make North Carolina the first state in the nation with a robust public financing program for candidates in statewide judicial elections.

The FUND FOR MODERN COURTS is a private, non-profit, non-partisan organization dedicated to improving the administration of justice in New

York State. For over 50 years the cornerstone of Modern Courts' mission has been the fight for an independent, highly qualified and diverse judiciary based upon a merit-based appointive system for the selection of judges.

The ILLINOIS CAMPAIGN FOR POLITICAL REFORM is a non-profit, non-partisan public interest group that conducts research and advocates reforms to promote public participation, address the role of money in politics and encourage integrity, accountability and transparency in government.

JUSTICE FOR ALL is the Arizona counterpart to Justice at Stake. Justice for All is dedicated to the preservation of an independent, impartial judiciary and the merit selection/retention system of appointing and retaining judges.

The LEAGUE OF WOMEN VOTERS OF MICHIGAN is a non-partisan political organization which encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

The LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND is a non-partisan, non-profit organization which encourages active, informed participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

MASSACHUSETTS APPLESEED CENTER FOR LAW AND JUSTICE, INC. is one of 15 public interest law centers nationwide in the Appleseed pro bono justice center network. The Center devises non-partisan solutions to difficult social problems using teams of volunteer attorneys and other professionals and works to build a society that provides each individual access to justice and a genuine opportunity to lead a full and productive life. The Center believes an impartial judiciary is fundamental to the administration of justice.

The MICHIGAN CAMPAIGN FINANCE NETWORK conducts research and provides public education on money in Michigan politics. It has published analysis of the last five Michigan Supreme Court election campaigns.

MISSOURIANS FOR FAIR AND IMPARTIAL COURTS is devoted to protecting Missouri courts from attacks by special interest groups and preserving the Missouri non-partisan court plan. The organization seeks to promote courts that remain accountable to the Constitution and the laws of the states—not to political pressure and special interests.

The NC CENTER FOR VOTER EDUCATION is dedicated to improving the quality and responsiveness of elections through public education and research. The Center is a non-partisan, non-profit organization based in Raleigh, North Carolina.

OHIO CITIZEN ACTION was founded in 1975 and has 80,0000 members. Ohio Citizen Action's Money in Politics Project has identified sources of campaign contributions and the economic and policy interests of donors.

PENNSYLVANIANS FOR MODERN COURTS is a statewide non-profit, non-partisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving court administration, court financing and the jury system; eliminating bias; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses. The organization's mission is to ensure that Pennsylvania has fair and impartial courts that serve all Pennsylvanians.

TEXANS FOR PUBLIC JUSTICE is a Texas-based non-profit research and advocacy organization established in 1997. One of the organization's missions is to research the role of campaign contributions in the Texas judicial system and to promote a range of judicial reforms.

WASHINGTON APPLESEED is one member of the network described by the national Appleseed Foundation. Washington Appleseed operates in the State of Washington, which elects its judges in non-partisan elections.

The WASHINGTON APPELLATE LAWYERS ASSOCIATION (WALA) is an invitational organization of attorneys representing private and public clients in every substantive area of the law

in the appellate courts of Washington State, which elects judges by popular vote. WALA's mission includes fostering effective representation and efficient administration of justice at the appellate level, and safeguarding the integrity of the appellate process.

The WISCONSIN DEMOCRACY CAMPAIGN is a non-partisan watchdog group that tracks the money in state politics and advocates for campaign finance reform and other reforms promoting clean, open and honest government.

CHICAGO APPLESEED is a research and advocacy organization which promotes social justice and government effectiveness by identifying injustice in the community, investigating its causes, and finding effective solutions.

CHICAGO COUNCIL OF LAWYERS is a public interest bar association which strives for the fair and effective administration of justice.

AMICUS CURIAE BRIEF

No. 08-22

In the
Supreme Court of the United States

HUGH M. CAPERTON, ET AL.
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
West Virginia Supreme Court of Appeals

BRIEF OF LAW PROFESSORS RONALD D. ROTUNDA AND MICHAEL R. DIMINO AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

C. THOMAS LUDDEN
Counsel of Record
PHILLIP E. SELTZER
LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
(248) 593-5000

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STATEMENT OF INTEREST[1]

Amici curiae, listed by name in the Appendix, are professors of law at law schools in the United States, who teach, research, write and speak about professional and judicial ethics and constitutional law. As such, amici curiae have an interest in ensuring that the law is developed consistently with fundamental ethical principles that underlie our system of jurisprudence. Specifically, amici curiae submit this brief to highlight the dramatic break that Petitioners want this Court to make from existing precedent and some of the numerous problems that would occur if this Court proceeded down the path suggested by Petitioners. The Amici are submitting this brief in support of the Respondents.

SUMMARY OF ARGUMENT

Most issues related to judicial disqualification do not reach the level where the parties' constitutional rights need to be adjudicated. Historically, this Court has found a violation of the Due Process Clause only if a judge has an interest, almost exclusively financial, in the outcome of the case. In other words, due process requires the drastic remedy of recusal only when the traditional prohibition that Blackstone and Coke described – that a judge cannot sit on his own case – applies.

Now, however, Petitioners and their Amici ask

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[1] The parties have consented to the filing of this brief. Petitioners and Respondents have each filed a letter of consent to all amicus briefs with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel contributed monetarily to the preparation or submission of this brief.

this Court to create a new test, variously described as "probability of bias," "appearance of bias," "appearance of impropriety," or even "reasonable appearance of impropriety." If these concerns were raised to the level of constitutional prohibitions, they would engraft an unmanageable system of federal review onto the state court system. In the end, the problems created by any of these standards would likely do far more to undermine the public's confidence in the judiciary than the current rules.

Moreover, if adopted, these proposals would swiftly threaten the practice of electing state court judges even though there have been state judicial elections for longer than the Due Process Clause of the Fourteenth Amendment has existed. Finally, this proposal threatens one of the most vibrant examples of federalism, as the states currently exhibit an diverse and evolving set of methods for selecting judges, deciding how and whether they should retain their positions and deciding when they cannot hear particular cases. Consequently, this Court should reaffirm its traditional rule and affirm the judgment below.

STATEMENT OF FACTS

Many of the Amici supporting the Petitioners state that a party in this case made contributions to the campaign of West Virginia Justice Brent Benjamin. (*See, e.g.,* ABA Amicus Brief, p. 20). In fact, no party made any donations to his campaign, with the exception of a $1,000 contribution by the PAC of A.T. Massey Coal. Instead, one individual, Don Blankenship, made a $1,000 contribution to Justice Benjamin's campaign. (JA 208a). Mr. Blankenship also made independent expenditures and donated his

own money to a 527 organization, which made its own independent expenditures to support the election of Justice Benjamin. (JA 117a-141a). Although Mr. Blankenship is the Chairman, CEO and President of Massey Energy, which owns the Respondents, the distinction between corporations and their officers is a matter of hornbook law. In addition, while Mr. Blankenship is a shareholder of Massey Energy, he owns less than 0.5% of this publicly-traded corporation. Therefore, as a shareholder, Mr. Blankenship's share of the judgment in this case (if the corporate veil was pierced) that was reversed by the West Virginia Supreme Court of Appeals was $175,000, which is a small fraction of what he contributed to the 527 organization during the 2004 election cycle. *Compare* Massey Energy Co., Quarterly Report (Form 10-Q) I (11/7/08) (85.1 million shares outstanding), with Statement of Changes in Beneficial Ownership (Form 4) 1 (11/18/08) (296,935 shares owned by Blankenship).

ARGUMENT

I. Petitioners Are Proposing That this Court Make a Drastic Break from Precedent, Which Imposed the Drastic Remedy of Recusal for Due Process Violations Only in Very Limited Circumstances.

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 520 (1927). Following this distinction, this Court has found that due process requires recusal only in two specific circumstances.

A. This Court has found that the Due Process Clause requires recusal of a judge only when the judge has a direct financial interest in the outcome or when the judge has a party's or prosecutor's interest in the outcome of criminal contempt hearings.

The first category of due process cases are those in which the judge or magistrate has a "direct, substantial, pecuniary" interest in the outcome of the dispute. Most notably, in *Tumey*, the mayor, sitting as a municipal judge, had the financial incentive to convict defendants because there was "no way by which the mayor may be paid for services as judge, if he did not convict those who are brought before him." 273 U.S. at 520. In other words, the judge was being paid a contingency fee based on his conviction rate. Therefore, this Court held that the defendants whose cases were heard by the mayor/municipal judge were deprived of due process under the Fourteenth Amendment because "the judge . . . has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case." *Id.* at 523.

In *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972), this Court considered whether due process concerns prevented a mayor from also sitting as a magistrate to hear ordinance violations and traffic offenses. Between 1964 and 1968, the Village of Monroeville had received between one third and one half of its annual revenue from "fines, forfeitures, costs and fees imposed . . . in the mayor's court. 409 U.S. at 58. Therefore, this Court concluded that recusal was required because the mayor had an interest in

"maintain[ing] the high level of contribution from the mayor's court." *Id.* at 59.

Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986), illustrates the distinction between potential bias, which does not require recusal on due process grounds, and direct, personal, financial interest, which does. Alabama Supreme Court Justice Embry was a party to two cases against insurance companies that raised the substantially similar legal issues as those raised in *Aetna*. *Id.* at 817. Despite this, Justice Embry did not recuse himself, but instead joined the majority opinion of that court. *Id.*

The *Aetna* petitioners first claimed that their due process rights were violated by Justice Embry's participation in their case because he had expressed "general hostility toward insurance companies that were dilatory in paying claims . . . in his deposition. . . ." 475 U.S. at 820. This Court rejected this argument, holding that "allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation." *Id.* at 821.

But, the decision that Justice Embry joined also controlled the resolution of the legal issues in the cases in which he was a party. Therefore, this Court held that:

> while recognizing that the Constitution does not reach every issue of judicial qualification, . . . "it certainly violates the Fourteenth Amendment . . . to subject [a person's] livery or property to the judgment of a court the judge of which has a direct, personal, pecuniary interest

> in reaching a conclusion against him in his case."

475 U.S. at 821-822 (citing *Tumey*) (all alterations except first in original).

The second category of cases finding due process violations sufficient to justify recusal involve criminal contempt proceedings in which the judge conducting the contempt hearing had another interest in the outcome of the criminal contempt case.[2] For example, the Court in *In re Murchison*, 349 U.S. 133, 134 (1955), considered whether a judge who had served as a one-man grand jury from which the criminal contempt charges arose could also preside over the contempt case. Recognizing that the interest of such a judge was substantially similar to that of a prosecutor, the Court found that it would violate the defendants' due process rights for the same judge to serve as the one-man grand jury and preside over the criminal contempt hearing. *Id.* at 137, 139.

Following *Murchison*, this Court has also found "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971). In *Mayberry*, then, the judge reviled by the alleged contemnor could not preside over the hearing because the judge was essentially both a victim of and

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[2] None of these criminal contempt cases "involve[d] . . . the long-exercised power of courts summarily to punish certain conduct occurring in open court." *In re Murchison*, 349 U.S. 133, 134 (1955).

witness to the alleged crime.

The unifying thread in these cases, then, is not whether there was actual, potential or probable bias. Instead, recusal was required because the judicial officer faced the competing interests of adjudicating the case fairly and benefitting from one result. Therefore, the "due process clause sometimes requires a judge to recuse himself without a showing of actual bias," *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1371 (7th Cir 1994) (*en banc*), because actual bias is not the test for recusal on due process grounds.

The Court created easily applied rules for these cases. It did not adopt a vague "appearance of impropriety" rule because that language is too vague to form a rule. It may be the reason why the legislature or the court creates a disqualification rule, but it is not a rule in itself[3] – it is too ambiguous for that. The organized bar knows that it does not want to be governed by such a indeterminate standard, which is why the ABA no longer uses that language as a rule governing lawyers.[4] Therefore, this Court should find that similar language is also too vague for judges.

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[3] Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 Hofstra L. Rev. 1337 (2006).

[4] Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the "Appearance of Impropriety,"* 33 Hofstra L. Rev. 1141 (2005).

B. Petitioners' new test is such a significant break from prior precedent that it would require recusal on due process grounds in situations where the federal statute does not require disqualification.

"[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Aetna*, *supra*, 475 U.S. at 820 (citing *FTC v. Cement Institute*, 333 U.S. 683 (1948) (alterations in *Aetna*). For example, *Tumey* classified "matters of kinship, personal bias, state policy, remoteness of interest . . . [as] matters merely of legislative discretion." 273 U.S. at 520.

Congress has exercised its discretion and enacted a federal statute mandating disqualification in situations that do not require recusal as a matter of due process. Federal law expressly provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Disqualification is also required when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b).

Petitioners and their Amici use phrases similar to this statutory language to describe their proposed standards. Therefore, if their standard requires disqualification of Justice Benjamin, then federal judges should already be disqualifying themselves in similar circumstances under this federal statute.

In their brief on the merits, Petitioners argue that there was a "probability of bias" arising out of a

"debt of gratitude" owed by Justice Benjamin because of Mr. Blankenship's efforts to defeat Justice Benjamin's opponent. The Amici supporting the Petitioner argue that the independent expenditures funded by Mr. Blankenship,[5] create an "appearance of bias," an "appearance of impropriety," or a "reasonable appearance of impropriety" that requires recusal as a matter of constitutional law.

But, if such indirect expenditures during a previous election create a "debt of gratitude,"[6] then help in being nominated or confirmed to a lifetime appointment on the federal bench should create at least as great a "debt of gratitude." Moreover, if a "debt of gratitude" for past assistance creates a probability of bias or the appearance of either bias or impropriety, then ongoing or potential assistance in obtaining a new position should also create this same probability and improper appearances. This would especially be the case in the federal judicial system, where justices and judges have life tenure. After all,

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[5] Often mischaracterized as a contribution by a party to Justice Benjamin's campaign.

[6] It is generally assumed that contributions to a judge's campaign will influence the judge's decision making. But, this assumption may not be warranted. A review of three studies has led one academic to conclude that campaign contributions do not influence results. Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, The Professional Lawyer, Winter 2003, at 16, 18-19. In fact, some of the statistical evidence in those studies suggests that contributors are more likely to lose than win their cases before judges that they supported. *Id.* at 17-18.

no matter how much help a state court judge receives in winning one election, the judge will usually have to face the electorate again.

Associate Justices of this Court have become Chief Justice, and both Circuit and District Court judges have been elevated to higher federal courts. *See generally* Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse when Being Considered for Another Position,* 19 Geo. J. Legal Ethics 1187, 1202-04 (2006). In addition, federal judges have been appointed to positions within the administration, including Solicitor General, Director of the Federal Bureau of Investigation, Secretary of Labor, Security of Homeland Security, and Ambassador to the United Nations. *See generally id.* at 1204-08.

Therefore, if the "probability of bias" or the "appearance of impropriety" arising out of a "debt of gratitude" mandates recusal, then federal judges ought to disqualify themselves from cases involving issues vital to an administration after the administration advises them that they are under consideration for appointment to another positions. But, federal judges have not recused themselves as a matter of general course. 19 Geo. J. Legal Ethics 1187, *supra*, at 1204-08. This is because these situations do not create a reasonable basis for questioning the judge's impartiality and do not create a personal bias in favor of a party.

Furthermore, the President of the United States has far greater impact upon those who become Justices of this Court or lower federal court judges than anyone (other than the candidates) could have upon the election of a state court judge. Therefore, if the due process clause prohibits Justice Benjamin from sitting

on cases involving companies in which Mr. Blankenship has an interest, then the federal disqualification statute should have prevented Justices of this Court or other federal court judges from hearing cases in which the President who nominated them is a party or in which issues important to that President are at stake.

But, the Chief Justice appointed by President Nixon wrote an opinion adverse to him in *United States v. Nixon*, 418 U.S. 683 (1974), and Justice Powell participated in the case.[7] Similarly, neither of the two Justices appointed by President Clinton to this Court disqualified themselves when he was a party to a case before this Court. *Clinton v. Jones*, 520 U.S. 681 (1997). Chief Justice Roberts and Justice Alito recently participated in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), a case dealing with a contentious issues that was very important to the President that appointed them.

Therefore, in the past, federal judges, including Justices of this Court, have concluded that neither a "debt of gratitude" for their current position nor the ongoing potential for appointment to a different position justify disqualification under the federal statute. The federal statute requires disqualification in situations that this Court has held are not a matter of constitutional law, but instead are left to legislative discretion. *Tumey*, 273 U.S. at 520. As a result, Petitioners' new standard would require recusal as a

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[7] Justice Rehnquist did not participate in the decision, reportedly because of his association with criminal defendants who had a stake in the outcome of *Nixon*, rather than because of any debt of gratitude he owed to the President himself.

matter of due process in situations where statutory disqualification has not been required. Therefore, it is clearly a significant departure from the prior decisions of this Court, not the logical extension of them.

II. Although the Petitioners Seek a Clear Result for Themselves, Their Proposed Standards Would Not Create a Manageable Method for Determining Whether Due Process Requires That Future Judges Recuse Themselves.

The Petitioners want what all private parties to a lawsuit want. They have already exhausted all judicial review before the West Virginia state courts. Since this Court cannot review the state law bases for the decision, no matter how many new points of law were made or how different the new points of law were from existing West Virginia case law, they must have a basis in federal law for seeking reversal. They have chosen the due process clause of the Fourteenth Amendment as their vehicle for that review.

But, while their desired result is clear, the potential rules for achieving that result are not and would create significantly more problems than they would solve. In fact, they might even exacerbate the problem whose solution they claim to be proposing.

A. The proposals offered by Petitioners and their Amici will expand to cover a wide array of situations.

At the present time, the due process inquiry is rather simple. Due process does not require recusal unless (1) the judge will receive a significant personal financial benefit if the case is decided one way instead of another or (2) the judge is playing multiple roles in a criminal contempt hearing. But, if any of the

proposals submitted by the Petitioners or their Amici are adopted, then the due process inquiry will become much more difficult, its outcome will be much more uncertain, and it will affect many more cases.

If substantial independent expenditures made during a past judicial election campaign create such a "probability of bias" that disqualification of the candidate who benefitted from them is required to ensure due process, then the same is true if the opposing candidate prevailed. After all, revenge is at least as powerful a motivator of human conduct as gratitude. Moreover, this Court has already recognized that the due process clause is implicated when a judge is the victim of contemptuous conduct. *Mayberry*, 400 U.S. at 465-466. Therefore, the first logical extension of Petitioners' new rule is that judges can hear only the cases in which neither significant supporters nor significant opponents of their past campaigns are parties. However, there are many cases where the courts have refused to disqualify judges because they know the party or the lawyer.[8] Courts will have to reevaluate all of these state and federal cases if the Petitioners have their way.

In addition, as a practical matter, judges rarely see the actual parties in a case. The individuals that judges usually see during the proceedings are the attorneys for the parties. Therefore, if the due process clause prohibits a judge from hearing a case because a party has made a significant expenditure, then judges should recuse themselves from cases in which any

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[8] *See* discussion of cases in, Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: the Lawyer's Deskbook on Professional Responsibility* (ABA/Thomson-West, 2008 edition), at § 10.3-28.

attorney has made a significant expenditure. This logically means that judges also cannot hear cases involving attorneys that opposed the judge's election.

Creativity is also an important part of lawyering. If Petitioners' rule is adopted, creative (and cynical) attorneys might conclude that the easiest way to avoid specific judges is to give the judge a campaign contribution. In fact, a "clever" attorney could try to game the system by supporting both sides in a state supreme court race. "Whenever we create rules, we can expect that there will be those who use them to game the system," to disqualify judges as the case law recognizes.[9] If one justice whose legal position was favored by the attorney won, then future precedent might prove favorable. But, if the other justice won, then the attorney might disqualify that justice so that the justice would not be able to sit on cases involving that attorney. Either way, this attorney would "win."

Moreover, financial expenditures are only one form of support. Endorsements by newspapers, labor unions, chambers of commerce, professional associations, political parties, well known politicians, and advocacy groups could also be a decisive factor in a judge's election to the bench. They also may play a significant role in determining who is nominated or who is confirmed to a court. Their opposition may prevent a individual from being either elected or confirmed to a different judicial position. Therefore, under Petitioners' theory, the participation of any of these organizations or persons in the process, whether

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[9] Rotunda & Dzienkowski, *Legal Ethics: The Lawyer's Deskbook*, at § 10.2-2.11(d)(2)(iv)(3). *See also id.* at note 84, discussing cases.

for or against, could require the judge not to hear cases involving them. If a newspaper supported a judge, he would not be able to sit in a case involving a libel suit against that newspaper.

Furthermore, if the proposed rules are adopted, there is no rational basis for limiting the application of these rules to cases in which the judges have been elected. Everyone who has been confirmed as a federal judge has received significant support to become a judge. The nomination of some federal judges has generated significant opposition. This support or opposition should create at least the same "probability of bias" or "appearance of bias" as independent expenditures during an election, and perhaps more. The judge may feel "grateful," or it will "appear" to the public that the judge is responding to the those who supported his nomination. Or, the federal judge may be interested in being elevated to a higher bench, so that there is the "appearance" that he is deciding a particular way because that ruling would be appreciated by the President or a Senator who would promote his elevation. Therefore, if one of these tests were adopted, its application could not be limited to state court elected judges, but should also apply to the federal court system.

B. Adopting one of the ambiguous standards offered by Petitioners or their Amici will create a dramatic increase in the amount of litigation regarding whether judges should recuse themselves.

As several Amici note, motions to disqualify are infrequently filed and rarely granted. Under any of the new, ambiguous, and possibly multi-part tests offered by Petitioners and their Amici, this will certainly

change, which, overall, is a step in the wrong direction.

If a "probability of bias" requires the recusal of a judge, then there are many situations in which an attorney could legitimately argue that such a probability exists. Attorneys are required to be zealous advocates for their clients. They may believe that a different judge would be better for their case than the judge or judges originally assigned. Under any of the proposed new due standards or tests, attorneys would have much broader grounds on which to argue that a judge has a "probability of bias" against them, their client or their client's position. Even if they conclude that such a "probability of bias" does not exist, opposing counsel may reach the opposite conclusion.

This will dramatically expand the length of litigation, with the first phase of too many cases being the case against the judge, the last phase being a petition for certiorari to this Court requesting the due process clause review, with more motions and hearings on the subject found in between.[10] Moreover, the possibility that the entire state court proceeding could be set aside, with the case remanded to begin anew in the trial court, would hang over significantly more state court proceedings than it current does.

Time and cost may not be the biggest problem. As many courts and commentators have stated, our system is based upon the principle that judges will follow their oaths of office and attempt to preside fairly over matters that come before them. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765,

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[10] There is no rational reason why due process challenges would cease after the first trial court judge is disqualified.

796 (2002) (Kennedy, J., concurring). Under any of the new standards, many more attorneys would be quite properly advising clients that their constitutional rights are at risk if a certain judges hear their case. These multiple new methods of challenging the integrity of the judiciary will negatively affect the public's perceptions of the legal system.

C. Given the vast differences in state court judicial systems, it would be extraordinarily difficult to establish a clear test for ascertaining a due process clause violation.

States "may adopt recusal standards more rigorous than due process requires, and censure judgse who violate these standards." *White*, *supra*, 536 U.S. at 794 (Kennedy, J., concurring). In addition, states may adopt rules that govern how attorneys act, both inside and outside the courtroom, and they may create alternatives to outright recusal.

One of the primary purposes of legal standards is to set guidelines for determining how one should act. For example, statutes for recording interests in real property provide clear rules so that all participants in real estate transactions know who owns what interests in particular parcels of real property. This is the case even though the rules related to recording interests and the precedence of recorded interests differ from state to state.

The methods of selecting and retaining judges are much more diverse than the rules for recording interests in real property. Therefore, a Missouri retention election is different from a judicial campaign in which political parties nominate the candidates.

Both are different from elections in which the judges appear on a "non-partisan" section of the ballot. Different substantive legal issues will be considered important in different states. As a result, the methods of campaigning will be different, and the perceived problems will be different.

In addition, media markets are far different from state to state, and it will cost much more to run a statewide campaign in California than in North Carolina. In some states, newspaper endorsements may carry great weight, while, in others, the endorsement by a particular union might carry the day. From time to time, the endorsement by a specific politician might be the key to electoral success.

Given the vast differences in the states and their judicial systems, there will be different problems in each state. As a result, there is no one-size-fits-all solution that this Court can create for these different problems, only vague standards that will determine whether judges should be recused or not. Increasing the possibility and number of cases in which judges are recused will not target specific types of problems that different states believe exist.

Individual states, however, can target the perceived problems occurring in those states much more effectively through specific statutory requirements. The States may enact different rules for determining which family members, or law firms in which a family member is employed, can appear before a judge. They may enact requirements specific to their state's unique judicial system regarding what amount and type of campaign expenditures and contributions are acceptable and which require recusal. Moreover, they may create remedies and procedures short of

recusal to deal with appearances and potential biases that do not justify recusal. A state can always provide that a contribution of more than a fixed amount to the campaign for a judge will allow the other party to disqualify the judge. That is a bright line rule, and the legislature or court rule can create it, but the due process clause cannot.

Finally, Petitioners and their Amici argue that there are recent developments that require this Court's intervention. Some make eloquent arguments about how principles reflected in the due process cases could be extended to try to deal with these problems. But, it takes a great deal of time for the judicial system to create a workable body of precedent to deal with the variety of human conduct that may fall within a general rule. State legislatures can decide how to deal with the specific types of perceived problems affecting judicial selection and retention far more effectively through enacting new statutes. Similarly, state courts of last resort can do the same by adopting rules of conduct for judges or attorneys far more efficiently than this Court can create case law sufficient to handle the myriad situations that could arise.

In fact, a very good example of a state acting quickly to enact a clear rule to target a specific perceived problem occurred in West Virginia. After the 2004 election, West Virginia amended its election law to place the same $1,000 limit on contributions to 527 organizations that had previously applied to contributions directly to a candidate's campaign. W. Va. Code § 3-8-12(g). In other words, "democracy" has already been its "own correctiv[e]." *White*, 536 U.S. at 795 (Kennedy, J., concurring).

D. While granting the relief requested by Petitioners would provide only limited guidance for future courts, it would create an enormous threat to the practice of electing state court judges.

Under the vague standards offered by Petitioners and their Amici, any past assistance, or opposition, to a judge's election would come under increased scrutiny to determine whether it rises to the level at which due process requires recusal of the judge. In addition, the possibility of future reward for the "right" decision, or punishment for the "wrong" decision, also creates probabilities and appearances of bias. If anything, concerns about the future seem more likely to affect future conduct than concerns about the past.

Therefore, it will be extraordinarily difficult for these standards to co-exist with state court elections. But, this Court has only recently recognized that:

> [I]f . . . it violates the due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then-quite simply-the practice of electing judges is itself a violation of due process. . . . [This is not] the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with

> the election of judges ever since it was adopted. . . .

White, supra, 536 U.S. at 783.

Moreover, this Court also recognized in *White* that it is perfectly reasonable for a state to opt for judicial elections. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. . . . Which is precisely why the election of state judges became popular." 536 U.S. at 784.

There are perceived benefits and perceived detriments to any system of selecting and retaining judges. Many commentators praise the federal systems, and some are critical of state court elections. But, there are also competing benefits that result from the election of judges, such as increased accountability. In the past, this Court has recognized that the states are free to select their judges through elections. It should not now adopt a rule that will make it extraordinarily difficult for states that select their judges through election to manage that system.

Of course, we should not assume that the relief that petitioners request will always be limited to the election of judges. The appointment of federal judges is really an election, where the nominator is the President and the universe of voters is limited to the United States Senate. Any rule fashioned in this case will eventually work its way into the federal system, with unknown results.

RELIEF REQUESTED

This Court should affirm the judgment below.

Respectfully submitted,

C. THOMAS LUDDEN
Counsel of Record
PHILLIP E. SELTZER
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
3910 Telegraph Rd., Ste. 200
Bloomfield Hills, MI 48302
(248) 593-5000

APPENDIX

List of Amici Curiae

Ronald D. Rotunda, who is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law.

Michael R. Dimino, who is a Visiting Associate Professor at Florida State University College of Law and an Associate Professor at the Widener University School of Law.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MOTION FILED

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FEB 9 - 2009

William K. Suter,
Clerk

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No. 08-22

IN THE
SUPREME COURT OF THE UNITED STATES

HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORTION AND
SOVEREIGN COAL SALES, INC.
PETITIONERS

V.

A.T. MASSEY COAL COMPANY, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE SUPRMEME COURT OF APPEALS OF
WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* THE SUPREME COURT OF THE STATE OF LOUISIANA IN SUPPORT OF NEITHER PARTY

ESMOND PHELPS GAY
Counsel of Record
KEVIN RICHARD TULLY
CHRISTOVICH & KEARNEY LLP
601 Poydras Street, Suite 2300
New Orleans, LA 70130-6078
Telephone: (504) 561-5700
Facsimile: (504) 561-5743
Attorneys for The Supreme Court
of the State of Louisiana

MOTION FOR LEAVE TO FILE *AMICUS BRIEF* ON BEHALF OF THE SUPREME COURT OF THE STATE OF LOUISIAN OUT OF TIME

Now into Court, through undersigned counsel, comes The Supreme Court of the State of Louisiana which moves this Honorable Court for leave to file its *amicus curiae* brief in support of neither party for the reasons briefly set forth below.

While the Louisiana Supreme Court favors no party in this litigation, the Louisiana Supreme Court learned that certain *amicus curiae* briefs on the merits mentioned a Tulane Law Review article, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul.L.Rev. 1291 (2008), authored by Vernon Valentine Palmer and John Levendis. Those authors claimed to have found a link between campaign contributions and judicial

votes in favor of contributors' positions before the Louisiana Supreme Court.

The Louisiana Supreme Court's purpose in filing its *amicus curiae* brief is to apprise this Honorable Court that the Tulane Law Review article has been thoroughly refuted because of its flawed methodology, error-laden data selection, and faulty analysis. *See, e.g.,* Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 307 (2009); and because of its erroneous data collection, selection and analysis, *see* Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L.

REV. 281 (2009.) Due to the grave errors in the article, the Dean of the Tulane Law School issued a formal written apology to the Louisiana Supreme Court and to its Justices. And, the Tulane Law Review posted an Erratum on its website expressing deep regret over the article's errors.

The Louisiana Supreme Court seeks to file its *amicus curiae* brief to set forth the facts about this discredited, but cited-to, law review article. The Louisiana Supreme Court did not submit its *amicus brief* until after the other briefs had been filed so the Louisiana Supreme Court could determine the extent to which any party or *amicus curiae* presented the article as persuasive authority on any issue before this Honorable Court.

The Tulane Law Review article painted a false picture of the Louisiana Supreme Court and its Justices. The Louisiana Supreme Court, therefore,

asks this Honorable Court to grant leave to file the Louisiana Supreme Court's *Amicus Curiae* Brief out of time to bring to this Honorable Court's attention the errors of the cited Tulane Law Review article so this Honorable Court's decision in this case is not, even slightly, influenced by this discredited law review article.

Respectfully Submitted:

/s/ Kevin R. Tully

KEVIN RICHARD TULLY
ESMOND PHELPS GAY
COUNSEL OF RECORD
CHRISTOVICH & KEARNEY LLP
Suite 2300
Pan American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 561-5700
Attorneys for The Supreme Court of the State of Louisiana
Counsel for Amicus Curiae

9 February 2009

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STATEMENT OF INTEREST

The Supreme Court of the State of Louisiana is comprised of seven popularly-elected Justices, with one Justice elected from each of the seven judicial districts. The Louisiana Supreme Court is the court of last resort in the State of Louisiana.

While the Louisiana Supreme Court favors no party in this litigation,[1] the Louisiana Supreme Court has learned that certain *amicus curiae* briefs have referenced a Tulane Law Review article and suggested that this article found a link between campaign contributions and judicial votes in favor of contributors' positions before the Court.

Without question, this Tulane Law Review article has been refuted because of its flawed methodology, its error-laden data selection, and its faulty analysis. Due to the article's many and serious errors, the Dean of the Tulane Law School issued a formal written apology to the Louisiana Supreme Court and its Justices, and the Tulane Law School issued an Erratum, deeply regretting the article's errors.

Because the Louisiana Supreme Court believes this Court's decision in this case should rest upon the facts and law uninfluenced by a discredited law review article, the Louisiana Supreme Court files

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[1] The parties have filed letters with the Court consenting to all *amicus* briefs. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

The Louisiana Supreme Court as *amicus curiae* takes no position with respect to any issue or argument presented other than those expressed in the Louisiana Supreme Court's own *amicus curiae* brief.

this *amicus curiae* brief to set forth briefly the Tulane Law Review article's errors and to refer this Court to the authorities which explains the Tulane Law Review article's many and fundamental mistakes.

SUMMARY OF THE ARGUMENT

The article the Tulane Law Review published, authored by Vernon Valentine Palmer and John Levendis, entitled *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul.L.Rev. 1291 (2008), has been discredited because of its flawed methodology, *see* Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 307 (2009); and because of its erroneous data collection, selection and analysis, *see* Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 281 (2009). Indeed, due to the serious errors in the authors' article, the Dean of the Tulane Law School issued a formal, written apology to the Louisiana Supreme Court and to its Justices and the Tulane Law Review posted an Erratum on its website.

This Court, therefore, should accord the thoroughly discredited Tulane Law Review article no weight when this Court decides the case presently before the Court.

ARGUMENT

It has come to the attention of the Louisiana Supreme Court that in one or more of the *amicus curiae* briefs, reference is made to an article authored by Vernon Valentine Palmer & John Levendis entitled, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, published at 82 TUL. L. REV. 1291 (2008), along with the suggestion that this article had found a correlation between campaign contributions to particular justices' campaign committees and a particular justice's voting pattern.[2] Because the article and its authors' conclusions have been thoroughly discredited, the article should play no part in this Court's consideration of the discrete factual and legal issues before it.

Without belaboring too much detail, when the Louisiana Supreme Court learned of the scheduled publication of Palmer's and Levendis's argument – made public by the two authors' interviews with the radio and print media – the Louisiana Supreme Court retained counsel to review the Palmer and Levendis article, when published, and to respond to the authors' contentions, if appropriate.

Palmer's and Levendis's data collection and analysis contained astonishing errors and led to the

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[2] *See, e.g.*, Brief of *Amicus Curiae* The Brennan Center for Justice at NYC School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioner, pages 15-16, filed on January 5, 2009. One other *amicus curiae* brief references the Palmer and Levendis article, but notes the article's errors had prompted an apology from to the Court from the Dean of The Tulane Law School. *See* Brief of the Conferences of Chief Justices as *Amicus Curiae* in Support of Neither Party, pages 24-25, fn 47.

publication of rebuttal articles by scholar economists Robert Newman, Janet Speyrer and Dek Terrell and by attorneys E. Phelps Gay and Kevin R. Tully. Both articles were posted on the internet and then, as further refined, published by the Louisiana Law Review. *See* Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 307 (2009); and Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 281 (2009).

The errors in Palmer's and Levendis's article were so profound that the Dean of Tulane Law School issued a formal, written apology to the Louisiana Supreme Court and to its individual Justices,[3] and The Tulane Law Review issued and posted an Erratum on its Website.[4]

While the rebuttal articles speak for themselves, perhaps most notable of all the flaws in Palmer's and

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[3] *See* Lawrence Ponoroff September 10, 2008, letter at http://www.lasc.org/press_room/press_releases/2008/ARTU_APOLOGY_LETTER.pdf

[4] *See* The Erratum, http://www.law.tulane.edu/lawriew/ The Erratum reads: "The Louisiana Supreme Court in Question: An Empirical Statistical Study of the Effects of Campaign Money on the Judicial Function, published in Volume 82 of the Tulane Law Review at 1291 (2008), was based on empirical data coded by the authors, but the data contained numerous coding errors. Tulane Law Review learned of the coding errors after the publication. Necessarily, these errors call into question some or all of the conclusions in the study as published. The Law Review deeply regrets the errors."

Levendis's data collection was their inexplicable failure to know that during a large period included within their data collection, the Louisiana Supreme Court had not seven Justices but *eight*, one of whom would not take part in deciding a case.[5] Palmer's and Levendis's failure to know or recognize this significant fact prompted them to attribute a "vote" to a Justice who did not sit on the panel deciding a particular case in over twenty percent of the cases included in their data set. This critical error alone skewed and invalidated any statistical conclusions Palmer and Levendis sought to draw.[6] Palmer's and Levendis's article contained numerous other flaws and omissions, including their failure to cite a single

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[5] Pursuant to Act 512 of 1992, the Legislature created an additional judgeship for the Court of Appeal for the Fourth Circuit to be elected from the First District of the Fourth Circuit. The new judge was immediately assigned to the Louisiana Supreme Court and remained on the Louisiana Supreme Court until a special election was held for a newly-created Orleans Parish Supreme Court District. To accommodate this eighth justice until the Court reverted to seven justices, the Louisiana Supreme Court adopted amendments to Louisiana Supreme Court Rule IV that, in effect, caused the justices to be assigned on a rotating basis to panels of seven justices with the cases also randomly assigned to the seven-justice panels for decision. This system lasted between 1993 until September 2000, eight years of the fourteen year period included in the Palmer and Levendis data set. *See* Tully & Gay, *The Louisiana Supreme Court Defended*, 69 LA. L. REV. at 287-288.

[6] Although the body of their article suggests otherwise, in footnote 14 Palmer and Levendis admit that "[i]t is worth observing that this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors' positions." Palmer & Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, published at 82 TUL. L. REV. at 1294 n. 14.

case, let alone describe how any case may have been wrongly influenced and decided. *See* Tully & Gay, *The Louisiana Supreme Court Defended: A Rebuttal of* The Louisiana Supreme Court in Question, 69 LA. L. REV. 281, for a full discussion on the Palmer and Levendis data collection and analysis errors.

In addition to the critical data collection and analysis errors Palmer and Levendis made, they also employed faulty methodology as explained in the study authored by economics professors Robert Newman, Janet Speyrer and Dek Terrell in their study and entitled, *A Methodological Critique of* The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 307 (2009).

Professors Newman, Speyrer and Terrell explain that Palmer and Levendis ignored or were unaware of the extensive empirical economic literature studying the impact of campaign contributions of the recipients. *Id.*, at 308. Palmer and Levendis, according to these authors, failed to account for the pioneering studies done by Henry Chappell and Thomas Stratman which led Palmer and Levendis to overlook the "simultaneity issue," that is "whether contributions influence the voting behavior or whether the expected voting behavior influences contributions." *Id.*, 309-309. Palmer's and Levendis's failure to cite these studies or take into account this key econometric principle, "reveals a fundamental flaw" in Palmer's and Levendis's study. *Id.*, 309. This oversight led Palmer and Levendis to "employ" a statistical analysis "dismissed over twenty-five years ago as inadequate" for examining the issue. *Id.*, 315. Newman, Speyrer and Terrell also noted that Palmer's and Levendis's error rate as

described by Tully and Gay, *The Louisiana Supreme Court Defended,* 69 LA. L. REV. 281, was of a "magnitude . . . unacceptable for a scientific study and raises questions about the care taken with other parts of their [Palmer's and Levendis's] study." Newman, Speyrer and 'Terrell, *A Methodological Critique of* The Louisiana Supreme Court in Question, 69 LA. L. REV. at 311. In sum, these professors of economics deemed the Palmer and Levendis article to "consist[. . .] essentially of totally invalid statistical results and unsubstantiated assertions." For a full and scholarly econometric review of the Palmer and Levendis article *see* Newman, Speyrer and 'Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question,* 69 LA. L. REV. 307.

CONCLUSION

The discredited Palmer and Levendis article has no place in this Court's consideration of the discrete factual and legal issues before it. The Louisiana Supreme Court, having no position on the merits of the case before this Court, asks this Court to give no credence to the unsupported assertions Palmer and Levendis made in their now-discredited and invalidated article.

Respectfully Submitted:

ESMOND PHELPS GAY
COUNSEL OF RECORD
KEVIN RICHARD TULLY
CHRISTOVICH & KEARNEY LLP
Suite 2300
Pan American Life Center
601 Poydras Street
New Orleans, LA 70130-6078
Telephone: (504) 561-5700
Attorneys for The Supreme Court of the State of Louisiana

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMON MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

NORMAN L. REIMER
EXECUTIVE DIRECTOR,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W.
12th Floor
Washington, D.C. 20036
(202) 872-8600

PAMELA HARRIS
COUNSEL OF RECORD
CO-CHAIR,
AMICUS COMMITTEE,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

January 5, 2009

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David White, *Chief Justice Race Hinges on Respect for U.S. Supreme Court*, Birmingham News, May 22, 2006 8

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide and 35,000 affiliate members in all 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the fair and proper administration of justice.

Consistent with these objectives, NACDL has an interest in preserving both the actuality and the appearance of an independent and impartial judiciary, charged with making crucial decisions that can result in the loss of liberty or even life for a

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[1] The parties have filed letters with the Court consenting to all *amicus* briefs. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

criminal defendant. NACDL has a particular interest in ensuring that a constitutional remedy exists to protect criminal defendants from judges who are or appear to be biased against criminal defendants.

SUMMARY OF ARGUMENT

Under the Due Process Clause, every litigant is entitled to a fair hearing before a fair tribunal. This mandate is particularly crucial to criminal defendants who face the loss of liberty or life and depend on judges to protect their constitutional rights.

There is a tension between an elected judge's accountability to those constituencies who assisted in his or her election and the judge's role as independent and impartial arbiter. This tension is particularly pronounced in criminal cases because elected judges often run on "tough on crime" platforms. This Court can reverse the judgment of the West Virginia Supreme Court of Appeals in this case without reaching the question of when, if ever, campaign promises or contributions could require recusal in the criminal context. But unless the Court rules for Petitioners in this case and establishes that there are at least some excesses associated with judicial campaigns that compel recusal as a matter of constitutional law, there will as a practical matter be no due process constraints at all. Litigants, including criminal defendants facing the loss of liberty or even life, will have no constitutional recourse if they are before judges who

are or appear to be biased as a result of activities associated with their election campaigns.

ARGUMENT

I. THE CONSTITUTIONAL MANDATE THAT LITIGANTS BE HEARD BY A JUDGE WHO APPEARS TO BE FAIR, IMPARTIAL AND WITHOUT BIAS IS VITAL TO SAFEGUARDING THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968); *see also In re Murchison*, 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice") (internal quotation omitted).

Criminal defendants are especially dependent on the Due Process Clause of the Fourteenth Amendment to protect them from judges who are or appear to be biased against them. Because their liberty and even their lives hang in the balance, criminal defendants have even more at stake than civil litigants, who at most might be required to pay a monetary judgment if unsuccessful. Because judges must safeguard a criminal defendant's constitutional rights, the due process mandate that

judges both be and appear to be impartial is especially important in this context.

II. IN LIMITED CIRCUMSTANCES, JUDICIAL ELECTIONEERING CAN CREATE THE ACTUALITY OR APPEARANCE OF BIAS, VIOLATING A LITIGANT'S DUE PROCESS RIGHTS.

An independent and impartial judiciary is the cornerstone of the justice system in the United States. Judges must be "independen[t] of mind and spirit . . . to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." *United States* v. *Hatter*, 532 U.S. 557, 568 (2001) (internal quotation omitted). "[I]deally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *Chisom* v. *Roemer*, 501 U.S. 380, 400 (1991).

More than eighty-nine percent of state judges stand for election in order to obtain or retain office. Bert Brandenburg et al., *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 Geo. J. Legal Ethics 1229, 1230 (2008). Because elections are an intrinsic part of a democratic process, judicial elections are lauded as a way to make judges, like other public officials in the United States, accountable to the citizenry. *See, e.g.*, David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 271 (2008). There is, however, a

fundamental tension between judicial independence on the one hand and judicial accountability on the other, *id.* at 271-72, "between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. Judges subject to regular elections are "likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring).

This tension is particularly acute in the criminal context because the electorate often subjects judges to heightened scrutiny in criminal cases. Citizens, worried about crime, may put political pressure on judges for more convictions and harsher sentencing. They are frequently joined by police, prosecutors and victims' rights groups in agitating for such measures. Criminal defendants, on the other hand, are politically unpopular and lack the political power to respond in kind.

But in order to enforce the rights granted to criminal defendants by the Constitution, judges must at times make unpopular decisions. Decisions upholding a criminal defendant's rights—by, for example, excluding a coerced confession or evidence obtained unconstitutionally; barring out of court statements against the defendant under the Confrontation Clause; or granting a motion to

dismiss for lack of evidence—often provoke a decidedly negative reaction among the voting public. The media frequently contribute to the response, portraying such decisions as "letting a criminal defendant off on a technicality." The political pressures faced by judges persist at the appellate level, where elected appellate judges must review these same issues while also confronting defendants' claims of ineffective assistance of counsel and bias by the trial court.

The result is that many candidates for elected judicial office run on "tough on crime" platforms. To demonstrate their dedication to the cause of putting criminals behind bars, judicial candidates often highlight past rulings that show the requisite "toughness" on crime or promise—at varying levels of specificity—to be tough on crime if elected. The examples below illustrate these campaign tactics:

- In campaigning for an Illinois Supreme Court position, one candidate bragged in his literature that he had "never written an opinion reversing a rape conviction." *Buckley* v. *Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 226 (7th Cir. 1993).
- A candidate for an Indiana judgeship pledged to "stop suspending sentences" and to "stop putting criminals on probation." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997).
- A judicial candidate in Florida running a "tough on crime" campaign "pledged her

support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (*i.e.*, police and victims of crime)." *In re Kinsey*, 842 So. 2d 77, 89 (Fla. 2003) (per curiam).

- A judge running for election in Ohio stated she wasn't afraid to use the death penalty and *favored* it for convicted murderers. *In re Burick*, 705 N.E.2d 422, 425 (Ohio 1999).

- In his reelection campaign, a judge on the Texas Court of Criminal Appeals stated "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim." Clay Robison, Editorial, *Judge's Politics an Exception to Rulings*, Hous. Chron., Feb. 4, 2001, at 2.

By the same token, many judicial candidates attack their opponents as being "soft on crime." For example, in the 2008 campaign for the Wisconsin Supreme Court, Judge Michael Gableman ran television ads that labeled his opponent Justice Louis Butler "'Loophole Louis' for rulings favoring defendants in criminal cases." Debra Cassens Weiss, ABA J., *Wisconsin Justice Dubbed 'Loophole Louis' in TV Ads*, http://abajournal.com/news/wisconsin_justice_dubbed_loophole_louis_in_tv_ads (last visited Dec. 29, 2008). In the 2006 primary campaign for Chief Justice of the Alabama Supreme Court, Justice Tom Parker excoriated the Alabama

Supreme Court for its decision "to passively accommodate—rather than actively resist" this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), which held that it is unconstitutional to execute someone for a crime he committed when he was a minor. David White, *Chief Justice Race Hinges on Respect for U.S. Supreme Court*, Birmingham News, May 22, 2006, at B1. Indeed, the judicial campaign in this very case is a classic (if exceptionally well funded) example: television advertising accused Justice Warren McGraw of "[l]etting a child rapist go free" and labeled him, "too soft on crime. Too dangerous for our kids." Deborah Goldberg et al., *The New Politics of Judicial Elections 2004*, at 4-5 (2005).

In extreme circumstances, perhaps including those discussed above, statements made by judges during the course of judicial electioneering may jeopardize a criminal defendant's due process rights by depriving him of the actuality or at least the appearance of an unbiased judge. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 760, 765-67 (1995) (citing statistics and anecdotal evidence indicating judges facing election are (1) more likely to sentence a defendant to death and (2) less likely to enforce constitutional protections to a fair trial); *see also* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due*

Process Rights, 81 N.Y.U. L. Rev. 1101, 1109-12 (2006) (citing statistics indicating a correlation between increased sentences and proximity to reelection and between affirming sentences of death and proximity to reelection).

It is not NACDL's position in this case that judicial elections, judicial campaign speech, judicial campaign contributions and judicial electioneering generally violate the Due Process Clause. Nor does NACDL ask the Court to determine in this case when "tough on crime" promises by judicial candidates become so problematic that they create the actuality or appearance of bias in criminal cases and require recusal under the Due Process Clause. But, unless this Court recognizes that the extraordinary circumstances of this case—and, at a minimum, the clear appearance of bias resulting from Mr. Blankenship's massive contributions to Justice Benjamin's campaign—violate the Due Process Clause absent recusal, future litigants will have no constitutional recourse before a judge who is or appears to be biased as a result of conduct relating to a judicial campaign. Ruling for Petitioners here, even on narrow and fact-specific grounds, will send a much-needed signal that judicial electioneering, though generally valid, may in some particular cases cross a constitutional line and require recusal to ensure the actuality and appearance of an unbiased judge. Conversely, if this Court were to rule for Respondents even on the extraordinary facts of this case, judges and litigants

will believe—and appropriately so—that judicial electioneering can never implicate the Due Process Clause and require recusal. Such a result would leave elected judges and the states in which they sit with no incentive to reconsider or reform their own recusal standards in the light of constitutional concerns and would ultimately jeopardize criminal defendants' right to a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. at 136.

CONCLUSION

For the foregoing reasons, NACDL respectfully urges the Court to reverse and remand for further proceedings without Justice Benjamin's participation.

Respectfully submitted,

NORMAN L. REIMER
EXECUTIVE DIRECTOR,
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1660 L Street, N.W.
12th Floor
Washington, D.C. 20036
(202) 872-8600

PAMELA HARRIS
COUNSEL OF RECORD
CO-CHAIR,
AMICUS COMMITTEE,
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

HUGH M. CAPERTON, *et al.*,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Respondents.

On a Writ of Certiorari
to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS

ALAN B. MORRISON
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

ALLISON M. ZIEVE
Counsel of Record
LEAH M. NICHOLLS
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

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INTRODUCTION[1]

This case concerns $3 million spent by a single contributor to support a single candidate for a seat on a state supreme court and the appeal of a $50 million verdict against that contributor's company. The support of the contributor, respondent A.T. Massey Coal Co.'s chief executive officer, constituted more than 60% of the total amount spent to support the candidate's campaign. Given these extraordinary facts, the Court could resolve this case by holding simply that these facts create an appearance of impropriety so great as to violate due process.

Although just reversing the denial of Petitioners' recusal motion would convey the important message that campaign contributions can, in some circumstances, create an unconstitutional appearance of partiality and hence require recusal, and that proof of actual bias is not necessary to show a due process violation, Public Citizen urges the Court not only to reverse the decision below. The essential problem presented here often arises in cases that do not present such remarkable facts. Rather than issuing a fact-specific holding that resolves only this case and invites repeated petitions asking this Court to assess the due process implications of contributions in case after case, the Court should use this case as an opportunity to set forth factors for state courts to use in evaluating the due process issue in cases in which contributions to

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[1]Counsel for amicus Public Citizen authored this brief, and no entity other than Public Citizen made a monetary contribution to its preparation or submission. All parties have consented to the filing of this amici brief, and letters reflecting their blanket consent to the filing of amicus briefs in this case are on file with the Clerk.

judges and judicial candidates may present an appearance of partiality. After outlining some of the many ways in which the underlying issue arises, this brief offers suggestions about some of the guidelines that the Court could offer to state courts confronting similar issues.

INTEREST OF AMICUS CURIAE

Public Citizen is a nonprofit consumer advocacy organization headquartered in the District of Columbia, with approximately 80,000 members nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its members have been and will continue to be parties to and appear as amici curiae in litigation in state courts presided over by elected judges. As a corporation, Public Citizen is prohibited by the law of most states from contributing to political campaigns. Even if it were not prohibited from doing so, it could not afford to make substantial contributions and, in any event, would not do so because of its view that such contributions create the appearance that justice is for sale.

For many years, Public Citizen has been concerned about the due process implications of judges presiding over cases in which a party or a party's lawyer has made significant campaign contributions to a judge presiding over the case. In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*, Civil No. A-00-CA-218 (N.D. Tex.).

Bomer was brought by five Texas lawyers, Public Citizen, and another non-profit organization, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. Some of the lawyer-plaintiffs had contributed to judicial elections, and some had not. Most of their current and prospective clients were not repeat players in the judicial system and had no incentive to make contributions to judges, whether or not they could afford to do so. All the plaintiffs believed that the system of financing judicial elections in that state created the appearance, if not the reality, of partiality and impropriety by Texas state judges, to the detriment of the legal profession, the individual plaintiffs' law practices and their clients' interests, and the interests of the non-profit organization plaintiffs and their members.

The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts even to consider campaign contributions from a party or its lawyer to a judge as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, the Fifth Circuit affirmed the dismissal on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001). The outcome of this case shows the difficulty of addressing the due process issue presented here in a systemic challenge and the important opportunity this case offers for the Court to supply standards for state courts to apply in individual cases.

SUMMARY OF ARGUMENT

In the abstract, it is well established that due process prohibits not only a partial judge but the appearance of partiality as well. And it cannot be seriously disputed that, in some circumstances, campaign contributions from interested parties to the judge presiding over a case can create such an appearance. Yet as a practical matter, most state-court judges have refused to grant recusal motions based on campaign contributions, no matter the amount involved. This amicus brief highlights the breadth of the problem, which extends well beyond cases involving eye-catching contribution amounts or multi-million dollar verdicts. In deciding this case, the Court should make clear that, while the analysis in any particular case calls for a fact-specific consideration, actual bias need not be shown for judicial campaign contributions to create an unconstitutional appearance of impropriety. The Court should also provide guidelines for state courts to consider when faced with motions to recuse based on interested parties' judicial campaign contributions.

ARGUMENT

I. The Variety Of Situations In Which The Due Process Issue Arises And The State Courts' Responses Show The Need For The Court's Guidance.

This case involves contributions made directly by an interested person to support the campaign of a candidate for state supreme court justice. Other cases involving judicial campaign contributions have also fit

this description. *See, e.g.*, Petition for Writ of Certiorari, *Consolidated Rail Corp. v. Wightman*, No. 99-950 (while personal injury case was pending on petitions for discretionary review, plaintiff's counsel and his close family members contributed 4.4% and 4.7% of total contributions received by each of two Ohio justices), *cert. denied*, 529 U.S. 1012 (2000).

However, the due process issue can also arise when the contributor has a more indirect interest in the outcome of the litigation. *See, e.g.*, Ill. Elec. Code, 10 ILCS 5/9-1, *et seq.* (no limits on contributions, including from corporations and unions); Petition for Writ of Certiorari, *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 05-842, at 5-6 (while case was pending, successful candidate for Illinois supreme court justice received more than $1 million from groups with which the party was affiliated, as well as more than $350,000 in campaign donations from one party, its lawyers, amici, and their lawyers), *cert. denied*, 547 U.S. 1003 (2006) (denying petition for certiorari).

And although the facts of this case—the dollar amount of the contributions made and the dollar amount of the verdict on appeal—make it particularly noteworthy, the due process issue presented here also arises in cases involving less conspicuous facts. *See, e.g.*, *Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364 (Ala. Civ. App. 2008) (divorce proceeding); *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. Ct. App. 2007) (child custody proceeding); *Inlow v. Henderson, Daily, Withrow & DeVoe*, 787 N.E.2d 385 (Ind. Ct. App. 2003) (case involving claims of negligence, legal malpractice, and breach of contract); *Pierce v. Pierce*, 39 P.3d 791,

799 (Okla. 2001) (divorce proceeding); *In re Disqualification of Jackson*, 704 N.E.2d 1236 (1998) (divorce proceeding); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (trial judge personally solicited and received contribution while case pending, in matter involving real estate transaction between individuals).

Although contributions to the campaigns of state supreme court justices often receive the most attention, campaign contributions by interested parties are not limited to supreme court elections. *See, e.g.*, state-court decisions cited *supra* page 5. For instance, in the family courts of Tarrant County, Texas—where "judges [not a jury] decide all but a handful of cases"—lawyers with pending cases comprise the vast majority of the contributors to the campaigns of sitting judges. *Lawyers give, judges take, ethics experts worry*, Ft. Worth Star Telegram, June 11, 1994.

Not surprisingly, individuals and organizations with substantial interests in litigation, including lawyers, businesses, and interest groups with a significant number of cases pending before the courts, are the primary contributors to campaigns for judicial office. For example, a study of recent contributions to Ohio Supreme Court candidates found that the insurance and healthcare industries "dominated contributions to the incumbents." Turcer & Holzen, *Contributions to Candidates for Justice of Ohio Supreme Court from November 5, 2007-April 4, 2008*, at 1 (available at http://www.ohiocitizen.org/money/judicial/candidates08/candidates08.html). And the parties and lawyers involved in six of the nine cases heard by the Texas Supreme Court in February 2004 had contributed

$716,279 to the nine justices. Texans For Public Justice, *Dollar Docket* (Mar. 2004), *available at* www.tpj.org/publication_list.jsp?typeid=1. Such figures are not unusual. *See id.* (contribution totals from Feb. 2002 - Apr. 2004).

When *unopposed* judicial candidates receive campaign contributions from individuals or law firms with cases pending before them, the appearance that contributors are donating to curry favor with the judge, rather than expressing a view on the merits of the candidates, is strong. For instance, in the 1997-98 election cycle in Texas, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one opponent raised $134), yet they raised 7.6 to 68 times the amounts raised by their general election opponents. Texans For Public Justice, *Checks & Imbalances: How the Texas Supreme Court Raised $11 Million*, Part IV at 2 (Apr. 11, 2000), *available at* http://www.tpj.org/reports/checks/toc. html. And each won easily. *See* http://elections.sos.state.tx.us/elchist.exe (election results posted by Texas Secretary of State). On the other hand, contributions in a hotly contested election also raise concern, as a judge may feel particularly beholden to those who helped him or her to prevail in a tight race. *See, e.g., Avery*, discussed *supra* page 5.

In the absence of effective recusal guidelines, judicial campaign contributions by people with interests before the courts—including parties, their lawyers, their law firms, trade associations, and labor unions—have a negative impact on the public's faith in the impartiality of the judicial system. Indeed, numerous

surveys show that a large majority of the public believes that contributions to state judicial campaigns influence judges' decisions. *See, e.g.*, Minn. Jud. Branch, *The Minnesota Difference: The Minnesota Court System and the Public* 16 (2007), *available at* www.mncourts.gov/?page=519; *Report from the Commission to Promote Public Confidence in Judicial Elections* 13 (N.Y. June 29, 2004), *available at* www.nycourts.gov/press/; National Center for State Courts, *How The Public Views The State Courts, A 1999 National Survey* 3 (May 1999), *available at* www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. This concern was the thrust of the amicus brief filed by 40 major U.S. corporations in support of the petition for certiorari in *Dimick v. Republican Party of Minnesota*. *See* Brief of Amici Curiae Concerned Corporations in Support of Petitioners, *Dimick*, No. 05-566, *cert. denied*, 546 U.S. 1157 (2006).

Unfortunately, while the public, including litigants and lawyers, generally perceives an appearance of impropriety in many situations, state court judges have been extremely reluctant to acknowledge when a campaign contribution creates an appearance that rises to the level of a due process violation, no matter the circumstances. Thus, a New York Times study of the Ohio Supreme Court found that, "[i]n the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors' cases." Liptak & Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006. "In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times." *Id.* In other states, recusal may be even rarer. For

example, Texas courts have repeatedly rejected the notion that acceptance of campaign contributions from a party or its lawyer may *ever* constitute a due process violation or provide grounds for recusal. *See*, *e.g.*, *Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that "bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . . has been rejected by the courts of this state").

Through its Model Code of Judicial Conduct, the American Bar Association has encouraged states to take a step toward containing the appearance of impropriety sometimes caused by campaign contributions. The Model Code has long provided that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." ABA Model Code of Jud. Conduct, R. 2.11(A) (2007); *id.*, Canon 3(E) (1990). And the Model Code has long stated that in-person solicitation of campaign contributions by a judge or judicial candidate should be prohibited, *id.*, R. 4.1(A)(8) (2007); *id.*, Canon 5(C)(2) (1990), although a handful of states have not adopted that Canon. *See*, *e.g.*, Tex. Code of Jud. Conduct, Canon 4(D)(1).

In the 2007 amendments to the Model Code, the ABA accepted the argument that is at the heart of this case—that campaign contributions may, in some cases, require recusal. The ABA thus added to the Model Code, as a specific basis for recusal, campaign contributions above a minimum amount (not specified in the Model Code) from a party, his or her lawyer, or the law firm. ABA Model Code of Jud. Conduct, R. 2.11(A)(4).

Although most states have adopted the general standard of ABA Rule 2.11(A),[2] instances in which state judges recuse themselves or are disqualified based on an appearance of impropriety for any reason are exceedingly rare. *But see, e.g., Pierce*, 39 P.3d at 799; *Dean v. Bouderant*, 193 S.W.3d 744, 752 (Ky. 2006) (chief justice granting motion to recuse himself where he received numerous campaign contributions from many of a party's attorneys and party requesting recusal was party harmed by recusal decision). And only Alabama has adopted the Model Code's language requiring recusal or disqualification when campaign contributions of parties and lawyers exceed a specified amount. *See* Ala. Code §§ 12-24-2(c) (requiring disqualification when contributions exceed $4,000 to an appellate judge or $2,000 to a circuit judge). Mississippi's Code of Judicial Conduct states that a party or attorney's status as a "major donor" may be grounds for such recusal, although it does not define "major donor." *See* Miss. Code of Jud. Conduct, Canon 3E(2).

Moreover, the recusal provision of the ABA Model Code does not address contributions from people who are not parties, such as amici, political action committees, or, as in this case, an officer of a corporate

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[2] *E.g.* Conn. Code of Jud. Conduct, Canon 3(c)(1); Fla. Code of Jud. Conduct, Canon 3E(1); Idaho Code of Jud. Conduct, Canon 3E(1); Kan. Sup. Ct. R. 601A, Canon 3E(1); Minn. Code of Jud. Conduct, Canon 3D(1); Ohio Code of Judicial Conduct, Canon 3E(1), 3G(1); Okla. Code of Jud. Conduct, Canon 3E(1); S.C. R. App. P. 501 at Canon 3E(1); S.D. Code of Jud. Conduct, Canon 3E(1); Tex. R. Civ. P. 18b(2)(a); W. Va. Code of Jud. Conduct, Canon 3E(1).

party to the case, as opposed to the party itself. The ABA Model Code also does not include the other factors discussed below that are related to, but separate from, the amount of the contribution itself.

II. The Court Should Make Clear That A Showing Of Actual Bias Is Not Required And Offer Parameters For Considering The Due Process Issue.

A. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).[3] The Due Process Clause forbids even the "possible temptation to the average man as judge"

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[3] *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) ("goal" of federal recusal statute, 28 U.S.C. § 455(a), "is to avoid even the appearance of partiality").

not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made. More recently, in *Aetna Life Insurance Co.*, the Court held that due process required a judge's recusal because issues in the case were also presented in litigation to which the judge was a party. 475 U.S. at 823, 825. The Court emphasized that, in these circumstances, the judge's participation violated the appellant's due process rights, regardless of whether the judge was actually influenced by his personal interest. *Id.* at 825.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists could not preside over hearing against competing optometrists). *See, e.g.*, *Ward*, 409 U.S. at 58-59 (invalidating scheme whereby mayor responsible for revenue production also adjudicated traffic and ordinance violations, where fines and other money derived from proceedings in mayor's court accounted for substantial portion of village's revenue); *Marshall*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the

opportunities for abuse inherent in a regime of large individual financial contributions.").[4]

Notwithstanding this Court's precedents, lower courts, including the court below, "have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications." JA 665 (Chief Justice Benjamin, concurring) (citing decisions from the Third, Eleventh, and Seventh Circuits); *see also State v. Canales*, 916 A.2d 767, 781 (Conn. 2007); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006); *State v. Reed*, 144 P.3d 677, 682 (Kan. 2006); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D. 2004); *Kizer v. Dorchester County Voca. Educ. Bd. of Trs.*, 340 S.E.2d 144, 148 (S.C. 1986); *Williams*, 65 S.W.3d at 689; *Curvin*, 2008 WL 400364.

This rejection of the principle that "justice must satisfy the appearance of justice" threatens the due process rights of litigants. Here, for example, whether or not the decisions below were in fact affected by the sizable campaign contributions described in the petition, neither petitioners nor the public can have faith that the outcome of the case was not affected by the contributions to the judge who ruled in favor of his supporter. Indeed, the appearance of partiality in this case—where A.T. Massey Coal's chief executive officer spent $3 million to support the campaign of a candi-

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[4]Justice O'Connor raised the question whether "the very practice of electing judges undermines" the interest in a judiciary that both is and appears to be impartial, and she emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

date for the state supreme court while his company was preparing to appeal a $50 million verdict against it, and that $3 million was more than 60 percent of the total support for the Justice—is much stronger, and the connection between the money and the appearance of impropriety is far more direct, than in *Ward*.

Accordingly, in deciding this case, the Court should firmly reiterate the "stringent rule" that due process may sometimes require recusal or disqualification of judges "who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618.

B. Several Factors Are Relevant To Determining Whether Campaign Contributions Create An Unconstitutional Appearance Of Impropriety.

An unconstitutional appearance of partiality does not arise in every case in which a party has made a contribution to a judge. However, as this case illustrates, and with few exceptions, state-court judges fail to acknowledge the possibility of a due process violation in even the most egregious of cases. Accordingly, to ensure that state courts apply reasonable and effective approaches to evaluating motions for recusal based on this due process concern, the Court should provide a framework or list of factors to be applied when considering such motions. In any given case, the due process analysis will require a nuanced consideration of the facts and circumstances, as due process analyses tend to do. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). Nonetheless, a set of factors to guide

the state courts will ensure that the burden of deciding these issues will generally not fall on this Court.

Factors pertinent to the due process analysis should include who made the contributions at issue (*e.g.*, the parties, the lawyers, amici); the amount of the monetary support and the percentage of that amount relative to the total amount the judge received; whether the contribution was made to the candidate or a political committee, and if the latter, whether the committee supported many candidates or, as here, was devoted solely to defeating one candidate (and hence electing the other); the timing of the contributions vis-a-vis the litigation (*e.g.*, how recent was the contribution, whether the case was already pending and at what stage); whether the judicial candidate was unopposed or faced a competitive race; whether the contributor gave non-monetary assistance though fundraising efforts or by assuming a leadership position in the campaign; whether the decision to deny recusal was made only by the judge being challenged or was joined by others on the court; and whether similar contributions were made by people with interests on both sides of the litigation (or by the same person to all candidates) or just one. The court may also wish to indicate whether some factors—for example, the percentage of the contribution relative to the total received by the judge—should weigh more heavily than others.

The Oklahoma Supreme Court looked to several of these factors in ordering recusal in *Pierce*, 39 P.3d at 798. There, the court concluded that "[w]hen, as in [that] case, (1) a lawyer makes a campaign contribution

to that judge in the maximum amount allowed by statute, and (2) a member of that lawyer's immediate family makes a comparable maximum contribution, and (3) that lawyer further assists the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge," disqualification is required. *Id.* Although the amount of the party's contributions relative to the total collected was not presented to the court, the opinion recognized the potential relevance of such evidence, noting that the party resisting the motion to disqualify could "defend the motion by showing that the contributions and solicitations were a minimal part of the judicial campaign." *Id.*

In reiterating that due process protects against an appearance of partiality and providing guidance as to how to assess whether campaign contributions create an unconstitutional appearance in a particular case, the Court need not be concerned that recognizing that campaign contributions can create an unconstitutional appearance of partiality will make a system of elected judges unworkable. Oklahoma's elected judiciary co-exists with the principle that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Id.* at 799. Yet no practical problems appear to have resulted because, although in Oklahoma due process may require disqualification in an individual case, a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him." *Id.* at 798.

More generally, every state requires recusal or disqualification under some circumstances. *See* ABA, Draft Report of the Judicial Disqualification Project, App. C (Sept. 2008), *available at* http://www.abanet.org/judind/pdf/JDP_9-9-08_Appendices_i.pdf (listing disqualification provisions by state). And every state has procedures in place for reviewing motions for recusal and disqualification and for replacing a judge after recusal or disqualification. In most states the procedures are set forth in statutes or rules, but in some they are established through case law. *See, e.g.*, 16 Ariz. Rev. Stat., Ariz. R. Civ. P. 42(f); Cal. R. Civ. P. §§ 170.1(c), 170.3; *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008).

For example, in Texas, a judge "shall" recuse himself when "he or a lawyer with whom he previously practiced law had been a material witness concerning [the subject matter]." Tex. R. Civ. P. 18b(2)(c). If the judge has not recused himself but a party believes that recusal is warranted, the party may file a motion for recusal. *Id.* 18a(a); Tex. R. App. P. 16.3(a). If a trial-court judge denies such a motion, the presiding judge of the district assigns another judge to hear the motion, and, if the motion is granted, the presiding judge or Chief Justice of the Supreme Court assigns another judge to hear the case. Tex. R. Civ. P. 18a(d), (f)-(g). If the challenged judge or justice is an appellate judge, and the judge or justice declines to recuse himself, the motion is reviewed by the remainder of the court sitting en banc. Tex. R. App. P. 16.3(b). State courts in Mississippi follow similar procedures. *See* Miss. Uniform R. Circuit & County Ct. Prac. 1.15; Miss. R. App. P. 48B; Miss. R. App. P. 48C; *see, e.g., Dodson v.*

Singing River Hosp. Sys., 839 So. 2d 530, 533-34 (Miss. 2003) (recusal required where partners in firm representing one party had represented judge in previous matters and one partner had served as treasurer in judge's campaign, thus creating reasonable doubt about judge's impartiality).

States may also consider as a starting point the approach taken in Alabama, where a state statute requires parties and lawyers to disclose the amount of their contributions to the assigned judge(s), and mandates recusal on the request of a party if either the opposing party or opposing counsel contributed more than $4,000 to a supreme court justice or court of appeals judge, or more than $2,000 to a circuit court judge. *See* Ala. Stat. § 12-24-2(a), (b). *But see Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364, *5 (Ala. Civ. App. 2008) (appeal from denial of motion to recuse trial judge; "the party seeking recusal must come forward with evidence establishing the existence of bias or prejudice"). Or states may consider taking steps to alleviate the instances in which the issue arises, as, for example, by adopting a public financing system for judicial elections. *See, e.g., N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (rejecting challenge to North Carolina statute creating system of optional public funding for candidates seeking election to state supreme court and state court of appeals), *cert. denied*, 129 S. Ct. 490 (2008).

* * *

At bottom, the question presented here is whether campaign contributions from interested parties to the

campaigns of the judges presiding over their cases or cases presenting issues of importance to them can ever create an unconstitutional appearance of impropriety. This case presents an opportunity for the Court to make clear that, although the totality of the circumstances matter and the issue is not susceptible to rigid rules, the answer to that question is yes. The Court should provide standards for state courts to apply in evaluating whether campaign contributions to judicial candidates create an unconstitutional appearance of partiality in particular cases. And because under any standard an unconstitutional appearance of impropriety exists in this case, the Court should reverse the decision below.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

Alan B. Morrison
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

Allison M. Zieve
Counsel of Record
Leah M. Nicholls
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

January 2009

AMICUS CURIAE BRIEF

No. 08-22

In the Supreme Court of the United States

♦

HUGH M. CAPERTON, et al.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., et al.,

Respondents.

♦

On Writ Of Certiorari To The West Virginia Supreme Court Of Appeals

♦

BRIEF OF TEN CURRENT AND FORMER CHIEF JUSTICES AND JUSTICES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

♦

PATRICK J. WRIGHT
Counsel of Record
140 West Main Street
Midland, MI 48118
(989) 631-0900

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE

Amici Curiae are ten current and former justices of the highest courts in their respective states.[1]

The current justices are Maura D. Corrigan, who has served on the Michigan Supreme Court since 1999, and who served as Chief Justice of that court from 2001 to 2005; Richard B. Sanders, who has served on the Washington Supreme Court since 1995; Evelyn Lundberg Stratton, who has served on the Ohio Supreme Court since 1996; and Robert P. Young, Jr., who has served on the Michigan Supreme Court since 1999.

The former justices are Raoul G. Cantero, III, who served on the Florida Supreme Court from 2002 to 2008; Craig T. Eonch, who served on the Texas Supreme Court from 1993 to 2003; Perry O. Hooper, Sr., who served as Chief Justice of the Alabama Supreme Court from 1994 to 2000; Burley B. Mitchell, Jr., who served on the Supreme Court of North Carolina from 1982 to 1999, and who served as Chief Justice of that court from 1995 to 1999; Harold F. See, Jr., who served on the Alabama Supreme Court from 1997 to 2008; and Clifford W. Taylor, who served on the Michigan Supreme Court from 1997 to

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici Curiae or their counsel, make a monetary contribution to the preparation or submission of this brief.

2008, and who served as Chief Justice of that court from 2005 to 2008.

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SUMMARY OF THE ARGUMENT

Many states in this country have a long tradition of electing judges, who, like their appointed counterparts, have been entitled to the strong presumption of integrity. These states with judicial elections have chosen the accountability model, which allows the public greater control over individual judges and judicial philosophy. Recently many interest groups have discovered that judicial philosophy is an important factor in determining whether judges are amenable to, or hostile to, public policies enacted by the legislatures. This has led to increased spending in judicial elections. In essence, the question presented here is whether the increased spending in judicial races should overcome the historical presumption of judicial integrity.

Only in rare instances has this Court found that the Due Process Clause of the Fourteenth Amendment overcomes the strong presumption of judicial integrity. In such instances, this Court has set forth prophylactic rules against judicial participation in limited types of cases in order to prevent the possibility that the average judge would fail to "weigh the scales of justice equally between contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). To date, most of this Court's constitutionally

mandated recusals occurred because the judge had a direct pecuniary interest in the outcome of the case.

Petitioners contend that a due process violation exists here because the expenditures made in a judicial election would create a debt of gratitude in a judge towards the individual that made those expenditures. Accordingly, they claim, public confidence in judicial integrity would be hurt if the judge failed to recuse in a case involving a party that employs the individual who made the expenditure.

The logic of such a debt-of-gratitude rule could not be limited in a principled way to the instant case; therefore, the entire process of judicial elections would be imperiled. Indeed, the logic of such a rule would apply when the judge is aware of the individual's preferred position even if neither that individual nor any related entity or person were a party. The logic would also apply to nonmonetary political support like editorial page endorsements or in-kind contributions such as get-out-the-vote efforts.

Were this Court to adopt a multi-factored amorphous due process rule, there are a number of likely consequences that would lead to decreased public confidence in the judiciary. Such a holding would endanger collegiality by creating the opportunity for political gamesmanship between different ideological factions on a court. "Weaponizing" the judicial disqualification process by importing a multi-factored due process notion would create a tool for litigants to use to undermine the people's democratically expressed

preference for a certain type of judicial philosophy. It could wreak havoc with stare decisis as "special" litigants would be able to create different compositions of a court by selectively targeting for disqualification judges whose judicial philosophy they deemed insufficiently congenial to the litigant's cause. By using disqualification as a weapon, litigants would be able to create a jurisprudence that would diverge from that which would have otherwise emerged from the court's duly elected judges.

Because the debt-of-gratitude argument has no logical stopping point and creation of an amorphous due process test will lead the public to holding the judiciary in lower esteem, this Court should not hold that lawful campaign activity creates a due process violation. Elected judges should retain their strong presumption of integrity.

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ARGUMENT

I. Judicial elections have a long history in this country, and elected judges are presumed to perform their duties honorably.

A. Elections and appointments.

State court judges and their federal counterparts have historically enjoyed a presumption of honesty and integrity. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 899 (8th Cir. 2001) (Beam, J., dissenting),

("Judges, elected or otherwise, are thought to be citizens of honor, integrity and fortitude."), rev'd on other grounds sub nom., *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).[2] But while all have agreed that integrity should be presumed, from the founding of our Republic there was a question whether judges should operate under an independence model or an accountability model.

In Anti-Federalist XV, Brutus set forth the accountability model. Brutus' concern about undue influence on judges was secondary to insuring a democratic check on judicial actions.[3] Obviously,

[2] Given that some state courts preexist the federal courts, and that judicial elections have such a long history in this country, it is somewhat distressing to see some of petitioners' amici liken state courts with elected judges to judiciaries in nascent democracies.

[3] Brutus noted that in the British system judicial appointments commissioned "during good behaviour" were acceptable because they prevented the King from having undue influence on judges whose salaries depended upon having the office, and because there was a sufficient check on judicial power. Brutus Essay XV (March 20, 1788) in The Anti-Federalist Papers and the Constitutional Convention Debates 304, 305 (Ralph Ketcham ed., 1986). But, he argued, such appointments were improper in the proposed federal constitutional system since there was not a sufficient check on judicial power:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

(Continued on following page)

Alexander Hamilton disagreed. In Federalist No. 78, he argued that judicial independence required lifetime appointments.[4] This question was decided, for the federal judiciary, in favor of Hamilton's view; but,

> . . .
>
> . . . A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; . . . but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them. . . .

Id. at 305-10.

[4] Hamilton explained:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 469-70 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

the question for the state judiciaries remained a matter for each State to resolve.

While the independence model originally was the accepted norm in the states, the rise of Jacksonian democratic principles and concern about the politics of judicial appointments led to the accountability model gaining ascendance. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, AM. B. FOUND. RES. J. 345. It is estimated that "more than 90% of the judicial business in this country is handled by state courts." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001). Nearly 89% of state court judges face elections. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1092 (2007).

B. Modern interest in state court litigation.

The rise of interest in state court elections should not come as a surprise. In 1986, as Justice Brennan believed that his federal colleagues were beginning to "underenforce" constitutional rights, he encouraged litigants to file suit in state courts under state constitutions. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Many litigants followed Justice Brennan's advice. For example, after this Court held that no fundamental right to education existed under the

federal constitution, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a number of suits were filed in state courts. See generally, Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992).

Another area that has led to increased attention to judicial elections is tort reform. A leading tort reform proponent contends that while state court decisions favor tort reform efforts by a two-to-one margin, nonetheless, ninety state court decisions have struck down tort reform laws. Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 246-47 (2000).

Regardless of what one thinks of tort reform, the divergent treatment of the reform efforts shows why so much attention is being paid to state courts. In a particular venue, presuming that a judicial decision favoring tort reform or one opposing it both are within the continuum of principled judicial decisions, then the judicial philosophy of a majority of the court becomes crucial. Legislatures are important, but in matters of state law, the courts can be the final arbiter of public policy changes. The same dynamic applies to other areas of the law, such as legislative redistricting, criminal justice, or gay marriage. This point has not been lost on the litigants or on interest groups and there has been a significant increase in interest and support of judicial campaigns.

At the same time that spending in judicial elections was increasing, this Court overturned a Minnesota Judicial Canon, the "announce clause," that was meant to limit judicial action regarding elections. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Many observers, worried that judicial elections were becoming too much like legislative elections, suggested recusals under the Due Process Clause to protect the neutrality and detachment of the independent judiciary.

C. Due process concerns that have overcome the presumption of honesty and integrity.

This Court has recognized that constitutionally mandated recusal is rare:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." [*Tumey v. Ohio*, 273 U.S. 510, 523 (1927)]; see also [*FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)] ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. . . . The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. . . . But that alone

> would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Lavoie, 475 U.S. at 820 (some citations omitted).

In those rare instances where this Court has found that due process concerns require judicial recusal, a prophylactic rule has been put forth. To date, no multi-factored, fact-dependent balancing tests have been created.

This Court has recognized that a direct pecuniary interest requires judicial recusal. The holding in *Tumey v. Ohio*, 273 U.S. 510 (1927), was that due process was violated when a mayor, who was sitting as a judge, had a financial interest in finding the defendants guilty:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Id. at 523. Once a pecuniary interest was shown, there was not a need to show that the particular judge was influenced by that interest. *Id.* at 532. This Court set forth a prophylactic rule to prevent potential due process violations. Direct pecuniary interest also led to recusals in *Ward v. Monroeville*, 409 U.S. 57 (1972), and *Lavoie*.

Recusal has been required where a judge acts as both prosecutor and adjudicator. *In re Murchison*, 349 U.S. 133 (1955). Also, recusal from criminal contempt proceedings has been required in some egregious instances where a judge had been subjected to serial abuse by the litigant. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In every situation where constitutionally mandated recusal has been required, this Court has set forth clear rules that are easily followed.

II. Petitioners' test would imperil judicial elections and would lead to the public holding the judiciary in lower esteem

A. Petitioners' proffered due process interests.

Petitioners put forth the following purported due process interest. They assert that Justice Benjamin owes a "debt of gratitude" for Mr. Blankenship's support and that Justice Benjamin would fear voting against Blankenship's interests because such a vote "may foreclose the possibility of similar financial support when the judge seeks reelection." Petitioners' Merits Brief at 31. Petitioners contend they are not seeking to prevent any litigant or attorney from making a contribution, but only seek to prevent contributions like the one at issue here. Petitioners also contend that finding a due process violation is necessary to preserve the public's respect for judiciary.

B. Debt-of-gratitude and reelection support as a pecuniary interest.

Petitioners' debt-of-gratitude pecuniary interest cannot be limited to the current factual situation and would imperil the very existence of judicial elections.[5] There are any number of people a judge could be wary of offending that could imperil a reelection.

For instance, many would argue that elected judges bend their decisions to reach popular outcomes. No remedy could prevent this. Take this Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), that economic-development takings were not prohibited under the federal constitution. Many elected state court judges have faced similar issues following *Kelo*. Are we to presume as a matter of constitutional law that all those judges would be concerned about the electoral consequences of ruling in favor of the developers? A campaign commercial featuring the bulldozing of a church, business, or a person's home could be quite effective in the current political environment. If that scenario raised due process concerns, what would be the proper remedy? Would the developers or municipalities be allowed to cherry pick which judges to file a recusal motion

[5] The futility of trying to create a useful standard is demonstrated by petitioners and petitioners' amici. Several wildly varying, non-exhaustive, multi-factored tests are put forth, but none provide a logical test for determining how much campaign support is too much. The brief of the states in support of Respondents ably demonstrates this point.

against thereby effectively manufacturing their own court? Would those entities need federal intervention to void any decision that prevented an economic-development taking?

If we limit the inquiry to electoral support, problems remain. Sometimes, the judge might know the hopes of a major contributor where that contributor is not a party. One does not need the Chamber of Commerce to be a party to know how it feels about tort reform. Nor does a state employees' union need to be a party for judges to understand whether the union would prefer a right-to-work law to be broadly or narrowly interpreted.

Further, interest groups such as unions, trial lawyers, businesses, doctors, and others often act in concert. While sometimes their individual donations might be small, in the aggregate they can become quite large. Should any judge with significant union support be recused in all labor cases? Should any judge with significant trial lawyer support or support from physicians be recused in all medical malpractice cases? Should any judge with significant business support be recused from workers' compensation cases or tort reform? If the disqualification standard is that there is the potential for offending a significant donor (or group of donors) and thereby imperiling reelection chances, the scenarios are endless in which such interest groups will be energized to use disqualification as a legal and political weapon.

There are also many nonmonetary yet valuable contributions that a judicial candidate can receive. Endorsements from other public officials are quite useful. Imagine that a state attorney general or a governor endorsed a judicial candidate. Should that judge face recusal whenever an entity represented by the attorney general appears before the court? Would the judge be allowed to sit on any case in which the Governor or an executive agency is a party? Clearly, one could argue that a judge would not want to embarrass a political ally by holding that the ally or those under his or her control had acted in an unlawful manner since such a holding might jeopardize future endorsements.

Newspaper endorsements are sought by judicial candidates. Should any judge who has received such an endorsement be recused from any libel suit involving the paper?[6] Should endorsed judges be recused from Freedom of Information Act or Open Meetings Act suits, which are often of great interest to newspapers

[6] In *Schultz v. Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982), a recusal motion under 28 U.S.C. § 455(a) was denied where a plaintiff in a libel suit sought to recuse the federal trial judge who, during trial, had received a supportive editorial from one of the defendants upon her nomination to the Sixth Circuit. *Schultz*, 668 F.2d at 919-20 Under petitioners' test, that holding is dubious since the trial court would have been indebted to the newspaper for its editorial.

Baker v. City of Detroit, 458 F.Supp. 374 (E.D. Mich. 1978) is another case where a recusal motion for indebtedness due to a recommendation for promotion was rejected.

even when they are not parties? The failure to receive a future endorsement could seriously impact a judge's reelection odds.

Judges sometimes seek endorsements from police officers associations. Because these endorsements are valued and might seriously impact a judge's reelection fortunes, should a criminal defendant be allowed to seek recusal from any judge who has received one?[7]

Aside from endorsements, what about in-kind contributions? The people who knock on doors and distribute literature or fill envelopes or organize get-out-the-vote operations aid judicial campaigns in getting the message out to the voters and in getting the voters to the polls. To the extent that these are political party volunteers, it may be that the rule of necessity prevents any recusal scenario since any matter involving one major political party will naturally involve the other and someone has to hear the case.[8] But sometimes these volunteers may be from

[7] In *Pennsylvania v. Abu-Jamal*, 720 A.2d 121 (Penn. 1998), a criminal defendant who had murdered a police officer sought the recusal of a state supreme court justice who had received the endorsement of the Fraternal Order of Police. The justice noted that the movant had not sought to recuse other justices who had received that same endorsement, and the motion was denied. This holding would seem to be imperiled by petitioners' debt-of-gratitude test.

[8] If the rule of necessity were not to apply when political parties were involved, then would all political cases be heard entirely by panels of visiting judges?

interest groups not from the political parties themselves. Should a judge face recusal since the judge's reelection might be imperiled if that group does not support him or her in the future?

Some of petitioners' amici would exempt support from traditional supporters or at least weigh it less heavily in a due process analysis. But there is no justification for this. There is no logical reason that an entity's traditional support should be less worrisome; the mere fact that an entity figured out the importance of judicial elections before others did is not a principled basis for allowing it to receive special treatment or for not allowing such treatment to another.

In essence, petitioners are haggling about price; they contend that at a yet-to-be-determined point campaign support (even if indirect) means average judges will act unethically or at least be so tempted to do so that recusal is constitutionally required. They want this Court (or perhaps lower federal courts) to determine when that point is met.

The "most notable strength" of judicial elections is that these elections force judges to interact and communicate with the public: "This system fosters communication with the electorate, speech-making, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred." *Adair v. Michigan Dep't of Educ.*, 709

N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., Markman, J.); see also, Harold See, "An Essay on Judicial Selection" in Keith Bybee (editor), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford University Press, 2007) (discussing benefits of judicial elections). If judicial elections are to exist, those campaigns should be "well-funded and informative" so that the candidates and their supporters can "be afforded the fullest opportunity" to explain judicial philosophy and other potential differences between the candidates. *Adair*, 709 N.W.2d at 580.

Thus, the debt-of-gratitude argument is difficult to contain. It is really no different than the argument that Hamilton put forth two centuries ago that has been rejected by numerous states. Petitioners and their amici contend that their due process disqualification argument does not imperil judicial elections. But if, as petitioners imply, judges have a direct pecuniary interest in reelection, it is difficult to see how judicial elections can continue to be viable. The inexorable result of acceptance of petitioners' due process recusal argument is that voters may continue to elect their judges, but those judges cannot actually serve.

C. Public perception of judiciary.

Petitioners and their amici cite some public opinion polls and contend that public confidence in the judiciary would be imperiled if a due process violation were not found here. This argument is examined in depth below, but it is first worth noting

that there is a certain irony in using public opinion polls to seek recusal of a democratically elected judge. In states with judicial elections, the public has chosen to elect judges with a full awareness that candidates have to raise money to campaign. To the extent that the public expresses some cynicism in public opinion polls, it has not expressed that same cynicism at the ballot box when offered the opportunity to change judicial selection methods in proposed state constitutional amendments. *D'Aurizio v. Borough of Palisade Park*, 899 F.Supp. 1352, 1356 (D.N.J. 1995) ("Secrecy in voting is essential to the democratic process in obtaining the free exercise of the franchise and accurate voter opinion.")

Ultimately, adoption of a multi-factored amorphous due process test would not lead to more public confidence in the integrity of the judiciary; instead, it might lead to less. If this Court were to create a multi-factored due process test, someone would have to enforce it. Petitioners contend that a state supreme court justice's colleagues should do so in the first instance. This could exacerbate tensions that already exist on many courts over judicial philosophy. Further, politics might play a role; the judges' denials or determinations of judicial bias could be published and released to exert maximum political effect on their colleagues.

If this Court wishes to see what would become commonplace in state courts if a due process violation were held to exist here, it need look no further than Justice Scalia's denial of recusal in *Cheney v. United*

States District Court for the District of Columbia, 541 U.S. 913 (2004). There twenty of the thirty largest newspapers in the country contended that recusal was required because Justice Scalia had gone on a duck hunting trip with then Vice President Cheney who, in his official capacity, was the subject of a lawsuit that had received a fair amount of media attention.

After noting that many of the editorials contained factual and legal errors, Justice Scalia stated:

> [R]ecusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.
>
> My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before – visited not at his invitation, but at his predecessor's. . . . While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be

> corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

Id. at 927-28. Imagine the circumstances if the remaining eight members of this Court had, as a constitutional matter, an obligation to vote on the recusal motion after Justice Scalia denied it.[9] Imagine further that a single Justice disagreed, what would the media coverage have been like? And would a recusal process such as this have led to greater respect for the judiciary?

An open-ended due process ruling will invite such challenges regarding state courts. Members of the Michigan Supreme Court discussed this very point:

> [W]hile cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the [Michigan] Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect

[9] See *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995).

> essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 709 N.W.2d at 580-81 (Taylor, C.J., and Markman, J.). These recusal motions will, of course, lead to much sensationalized media coverage that will inevitably fail to provide the analysis and nuance needed for the public to properly understand the issues.

Most courts and individual judges do not have sufficient staff or funding to fight a coordinated public relations campaign, especially *after* an election. So not only could the media coverage impugn judicial integrity, but a judge who was the subject of such coverage might feel the need to raise even more campaign dollars during election season to counteract the negative press. This, of course, could exacerbate the perception problem of money influencing judicial results, the very perception that is being sought to be cured by a constitutional recusal standard.

The belief that litigants would not try to use constitutional recusal claims to manipulate the membership of the courts that hear their cases is naïve. While not a perfect example, Michigan's recent experience with a proposed constitutional amendment shows the willingness of some parties to strategically attack who hears certain cases via recusal motions. The amendment in question was offered by a group called Reform Michigan Government Now. On its face, it was a wide-ranging reform amendment that would have amended multiple parts of Michigan's

constitution. In reality, it was an attempt to change the judicial philosophy of Michigan's judiciary and obtain a partisan advantage in redistricting for one of the major political parties.[10] The proposed amendment eliminated two Supreme Court seats based on seniority and it eliminated a number of Court of Appeals seats based on a separate facially neutral criterion, but the clear intent was to remove judges aligned with one political party. The proposed amendment also reduced judicial salaries across the board. Having given almost all of the judges in Michigan a pecuniary interest in the amendment, the supporters then filed limited recusal motions against some, but not all of the justices of the Michigan Supreme Court.[11] The justices rejected the recusal on the grounds of the rule of necessity since all the judges had a pecuniary interest potentially affected. *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 147 (Mich. 2008).[12]

[10] This intent was disclosed on what was meant to be an internal PowerPoint presentation that was posted on a UAW website and clearly indicated the "reform" mantra was meant to mislead the public so that the judicial reformation and redistricting advantages would not be noticed. Screen captures of the PowerPoint slides can be found here: http://www.mackinac.org/article.aspx?ID=9668.

[11] The Michigan Supreme Court was deciding whether the proposed amendment should be placed on the ballot. See, *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 157 (Mich. 2008).

[12] A similar motion was filed against some, but not all, of the judges of the Michigan Court of Appeals. The order rejecting

(Continued on following page)

It must be remembered that in states with judicial elections, when a judge is recused, the people's will is being thwarted. Creating appearance-based due process recusals essentially gives litigants a weapon to overturn election results they do not like.

This is particularly true on state courts of final resort. These are the courts that set the binding precedent on state law matters. One presumes that litigants will usually file recusal motions only when they believe it can make a difference in the outcome of a case. A second reasonable presumption is that more recusals will be filed in cases with wide-ranging public policy implications because these are the issues that attract the donors in the first place.

Using tort reform as an example, say that business interests empty their coffers to change the judicial philosophy of a court by supporting Justice X. The people were made aware by the media and Justice X's opponents of the business support, and Justice X explained his judicial philosophy and won the election. A business supporter is a party to the suit, and after a due process challenge is made, Justice X is recused by a federal court (perhaps this Court). Assuming that state law allows for a replacement, tort reform is struck down by a one-vote margin with the replacement in the majority. Are the citizens stuck with a decision made by this "altered court" or

that motion can be found here: http://coa.courts.mi.gov/documents/coa/public/orders/2008/286734(33)_order.pdf.

after that case is decided, if no major contributor was a party, would it then be appropriate for the reconstituted elected court to take another tort reform case and overturn the previous decision? After all, the people were informed of Justice X's philosophy and elected him. What would be the impact on the public's respect for the judiciary if the law was quickly altered in such a fashion? These same issues would arise if a judge who would have made the difference to strike down a tort reform measure was recused due to support from the plaintiffs' bar.

The attempt to use due process recusals to prevent harm to the image of the judiciary fails. A constitutional recusal standard will lead to a dramatic increase in recusal motions. Frankly, armed with such a weapon, it is hard to understand why any litigant would fail to use it if he thought that the outcome of the case might be altered. Litigants and interest groups including the media will feel the need to publicize these claims of bias so as to obtain relief in the particular case or to potentially harm the reelection prospects of a judge whose philosophy they disagree with. This process would not reflect well on the judiciary.

♦

CONCLUSION

For the reasons set forth above, this Court should hold that the Due Process Clause of the Fourteenth Amendment is not implicated by otherwise lawful

contributions to campaigns, direct advocacy, or independent expenditures. Elected judges have traditionally been accorded the strong presumption of integrity, and the fact that recently more money has been spent on judicial elections should not change that.

Respectfully submitted,

PATRICK J. WRIGHT
Attorney for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08–22

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ of Certiorari to
the Supreme Court of Appeals of West Virginia

BRIEF *AMICI CURIAE* OF 27 FORMER CHIEF JUSTICES AND JUSTICES IN SUPPORT OF PETITIONERS

J. Mark White
William M. Bowen, Jr.
White, Arnold
& Dowd, P.C.
2025 Third Avenue No.
Birmingham, AL 35203
(205) 323-1888

Charles K. Wiggins
Counsel of Record
Wiggins & Masters, P.L.L.C.
241 Madison Avenue No.
Bainbridge Island, WA 98110
(206) 780-5033

Counsel For *Amici Curiae* 27 Former
Chief Justices And Justices

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STATEMENT OF INTEREST[1]

This brief is filed by 27 former chief justices and justices of 19 state supreme courts, all but one of which states elect their supreme court justices.[2] *Amici curiae*, all now former or retired judges, are:

Alabama:	Chief Justice C.C. Torbert
Arkansas:	Justice David Newbern
Georgia:	Justice Norman Fletcher
Idaho:	Chief Justice Charles McDevitt, Justice Byron Johnson.
Louisiana:	Justice Harry T. Lemmon

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or counsel for amici contributed monetarily to the preparation and submission of this brief. Counsel for petitioners and counsel for respondents have each filed with the Court a letter of consent to filing of amicus curiae briefs.

[2] Missouri uses the eponymous Missouri plan for initial selection, with periodic retention elections. The states of all other amici are election states.

Michigan:	Chief Justice Conrad L. Mallett, Jr.
Minnesota:	Chief Justice A.M. Keith, Chief Justice Kathleen Blatz, Chief Justice Russell Anderson
Missouri:	Chief Justice Edward D. Robertson, Jr.
Montana:	Chief Justice Jean A. Turnage, Justice John Sheehy
Nevada:	Chief Justice Robert Rose
North Carolina:	Chief Justice James Exum, Chief Justice I. Beverly Lake, Jr.
North Dakota:	Justice Herbert L. Meschke, Justice Beryl Levine
Ohio:	Justice Herbert R. Brown
Oregon:	Chief Justice Edwin J. Peterson
Pennsylvania:	Chief Justice Emeritus John P. Flaherty
Texas:	Justice Raul Gonzalez

Washington:	Chief Justice Robert Utter, Chief Justice Vernon Pearson, Chief Justice Richard Guy
West Virginia:	Chief Justice Richard Neely
Wisconsin:	Justice Louis Butler

Amici[3] have been candidates in contested supreme court elections. The states in which *amici* were elected use a variety of elections. Some *amici* were elected in non-partisan elections and some in partisan elections. Most *amici* campaigned in elections in which applicable canons of judicial conduct prohibited them from directly soliciting campaign contributions while others were permitted to directly solicit campaign contributions and did so. Some *amici* declined to accept any campaign contributions while others accepted contributions through campaign committees formed in support of their election.

The respective merits of the different systems for selecting judges and justices are not at issue here. But *amici* hold a variety of views on the ideal method of selection, some preferring partisan

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[3] The experiences and opinions of these former chief justices and justices are many and varied. When this brief recites the experience of "*amici*," the reference is to two or more *amici*. If all *amici* are intended, the brief makes this clear through "all *amici*" or similar wording.

election, some non-partisan election, while others prefer an appointive process, either with or without the involvement of a commission. Whatever system may be ideal, *amici* submit that it would be extremely difficult to alter the method of selection within their respective states, and most *amici* estimate the chances of change within their respective states as non-existent or very small.

Some *amici* served in states in which spending in supreme court elections had already spiraled out of control. Even in states in which judicial election spending remains at traditionally modest levels, *amici* believe that a careful decision from this Court will help to limit judicial campaign support to reasonable levels, serving as something of a vaccination against the plague of massive campaign fund raising and spending by special interests.

All *amici* view with alarm the increasing expense of mounting a serious campaign for election to a state supreme court, and with even greater alarm the increasing level of independent expenditures in these elections. Having devoted a significant part of their professional careers to the public service of administering justice, *amici* deeply care that the courts on which they served continue to decide cases with scrupulous impartiality. *Amici* offer their views based on personal experience to assist this Court in applying the due process clause to these issues.

SUMMARY OF ARGUMENT

Amici uniformly believe that the participation of Justice Benjamin in this case created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court. As the Court considers how the due process clause applies to this case, *amici* suggests that the Court consider three basic propositions.

Substantial financial support of a judicial candidate—whether contributions to the judge's campaign committee or independent expenditures—can influence a judge's future decisions, both consciously and unconsciously. *Amici* believe that the only way to preserve a litigant's due process right to adjudication before an impartial judge is to require that a judge recuse from a case not only when the judge consciously perceives the judge's own partiality, but also when there exists a reasonable appearance of partiality or impropriety.

The relatively recent phenomenon of substantial independent expenditures in judicial elections has no precedent at the common law. But the due process clause is sufficiently flexible to address novel practices and the Court should hold that the ancient rule that a judge cannot sit on a case in which the judge is financially interested applies to a case in which a party has provided

substantial financial support for the judge's election.

Applying the due process clause to this case will allow state supreme courts to continue to develop rules to provide much-needed guidance on when a judge must recuse from a case where a party has provided financial support to elect the judge. Such rules will provide bright line limitations guaranteeing an impartial judge well within the parameters of due process.

ARGUMENT

A. The appearance of fairness is an essential component of a judge's determination of the judge's own subjective ability to be fair.

A judge considering whether to recuse from a case considers first the judge's own subjective opinion whether he or she can decide fairly. But every judge is first and foremost a human being, not a detached and unemotional law machine. We are all fundamentally incapable of complete impartiality and indifference. The inescapable consequence is that there is a class of cases in which the judge incorrectly believes himself or herself to be impartial, blind to some innate or long-standing bias. The appearance of fairness guards against this unintended bias by requiring a judge to recuse from a case when a reasonable person would perceive an appearance of impropriety.

Legal writers have commented on the biases that can infect a judge's decisions.[4] One observed:

> [A] judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor . . . .[A judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.

Lord MacMillan, *Law and Other Things* 217-18 (1937). Jerome Frank noted the peculiarly individual factors that can influence decisions: "these uniquely, highly individual, operative influences are far more subtle, far more difficult to get at. Many of them, without possible doubt, are unknown to anyone except the judge. Indeed, often the judge himself is unaware of them." Jerome Frank, *Courts on Trial* 151 (1950). Justice Frankfurter similarly commented that, "judges are also human, and we know better than did our forebears how powerful is the pull of the

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[4] These examples come from Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1251 n. 175 (2002).

unconscious and how treacherous the rational process." *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring).

More recently, researchers have commented on the unconscious nature of many biases, pointing out that even judges who believe themselves to be fair and unbiased may in fact harbor unrecognized prejudices.[5] Thus, biases may be explicit or implicit:

> Explicit measures of attitudes operate in a conscious mode and are exemplified by traditional self-report measures. Implicit attitudes, in contrast, operate in an unconscious fashion and represent introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.[6]

A judge's subjective evaluation of impartiality protects only against explicit biases and attitudes. But a judge who bases recusal not only on a subjective evaluation of fairness, but also

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[5] Bassett, *supra* at 1248-50 and notes 176-84.

[6] *Id.* at 1249-50 (quoting John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510, 511 n. 179 (1997)).

on a more objective appearance of fairness, preserves much more effectively the litigants' due process right to an impartial judge.

The appearance of impropriety is also an essential basis for recusal because it is difficult and awkward for a judge to admit actual bias. Admission of actual bias runs counter to the deeply ingrained obligation to be fair. Recusal based on the perception of impropriety allows a judge to avoid admitting actual bias, making recusal more acceptable.

Amici have recused from cases based on the appearance of impropriety, both on motion and *sua sponte*, even though they believed they could judge fairly. Recusal in such cases is an essential prophylactic to preserve the due process rights of the litigants. It is also an important means of preserving public confidence in the judiciary.

B. Campaign contributions to elect judges were unknown to the common law and require a new paradigm for the application of due process.

A judge's financial interest in the outcome of a case has for centuries been the clearest and most compelling, and at times only, basis for a judge to recuse from a case. *See* Brief *Amicus Curiae of Washington Appellate Lawyers Association in Support of Petitioners* at 11-15. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), this Court held that a defendant's right to due process of law was violated by trial by the mayor of the town without a jury

where the mayor was paid a portion of the fine in addition to his salary and the fines augmented the town's finances. In *Tumey*, this Court looked to the common law to define the contours of due process with respect to a judge whose compensation depended on a conviction. Finding no precedent for the practice, this Court found it contrary to due process of law. 273 U.S. at 524-26, 531-32.

Similarly here, there is no common law precedent for the practice of electing judges, let alone making substantial independent expenditures in support of the judge's election. This case thus presents a hybrid unknown to the common law—a party who spent money to benefit the judge, and a judge who did not actually receive the money, but did benefit by election to the office.

Novel practices call for new paradigms of due process analysis; otherwise, cleverly designed schemes and convoluted machinations would eviscerate the ancient protections of due process. But new paradigms should evolve from well-established precedents. The heart of the common law rule was disqualification of a judge who would enjoy a direct pecuniary benefit from the outcome of the case. The rule is based on a transfer of a pecuniary interest from a litigant to the judge. In this case, the Court is faced with a massive pecuniary expenditure by a party. But the judge is not the recipient of the money; rather, the judge benefits by obtaining judicial office or a renewed term of judicial office. The fact that the judge's

benefit is something other than money should not preclude the application of the due process clause.

Any candidate who undertakes to run for supreme court justice has a substantial interest in winning the election. Many of these elections are state-wide and all call for the investment of hundreds of hours of time gathering support, responding to questionnaires, appearing before editorial boards and judicial evaluation committees, seemingly endless speaking engagements across the state, making difficult decisions about spending limited campaign funds, attending candidate debates, and countless meetings and telephone calls with campaign supporters. Hundreds of hours of productive time are diverted from the candidate's employment or personal time, inevitably sacrificing family time and personal time. Most candidates invest at least some of their personal funds in their campaigns.

Substantial financial support for a judge's election benefits the judge as surely as, although less directly than, a direct pecuniary interest in litigation coming before the judge. And although the salary is far from the primary motivation for a judicial candidate to seek office, the salary gives the candidate a financial stake in winning the election. In short, the party that supports a judicial candidate invests money and the judge receives a benefit other than the money itself. This relationship raises the common law concern about pecuniary interest.

Substantial financial support for a judge's election also meets the test for recusal stated by this Court in *Tumey*, which does not require that the judge is actually influenced, but only that the procedure creates the danger:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

273 U.S. at 532.

Amici do not believe that due process requires a judge to recuse from any case in which a party gave any financial support to the judge's election (although some *amici* have refused to accept any financial contributions for their election campaigns). Rather, *amici* submit that due process is only triggered by substantial financial support for a judge's election. *Amici* do not believe it is necessary for the Court to define specifically what constitutes substantial financial support. Suffice it to say that the massive financial support provided by respondent Blankenship to the election of Justice Benjamin triggers due process concerns under any reasonable definition of substantial financial support.

It should make no difference to the analysis that the financial support was provided to Justice Benjamin before he heard the respondents' case, as opposed to contributions after Justice Benjamin decided the case favorably to respondents. This fact pattern is inherent in judicial elections—the judge must attain the office before hearing the supporter's case. Moreover, Justice Benjamin must stand for election again in the future. The continued support of respondents to his re-election is a factor that Justice Benjamin must eventually consider.

The ancient guarantee of due process is sufficiently flexible to extend to the recent innovation of massive independent expenditures in judicial elections. *Amici* respectfully submit that this Court should extend the common law prohibition against a judge sitting on a case in which the judge has a pecuniary interest to a case in which a party has supported the judge's election with massive independent expenditures.

C. Applying the due process clause to this case will allow state supreme courts to adopt their own rules governing recusal where a party has provided substantial financial support for the judge's election.

The state supreme courts on which many *amici* sat have the responsibility to adopt the codes of ethical conduct governing judges and lawyers. Many of these courts are actively considering new

canons to provide much-needed guidance to judicial candidates and their supporters when financial support by a party becomes sufficiently high to require a judge or justice to recuse. Applying the due process clause to this case will allow the state supreme courts to proceed with this important rule-making function, and indeed, may even encourage it.

A holding by this Court will begin to define the due process limits for financial support by a party for the election of a judge. The state supreme courts can continue to craft rules establishing limits above which a sitting judge or justice would be required to recuse from sitting on the case and below which recusal would be entirely discretionary with the challenged judge or justice. Such rules would actually encourage reasonable financial support by providing a safe harbor within which a supporter could be reasonably confident that a judge would not be required to recuse from the supporter's cases.

Indeed, application of the due process clause may make it easier for state supreme courts to craft such rules. It can be difficult for state supreme courts to adopt rules that might discourage or diminish financial support to judicial candidates. All other things being equal, incumbent judges have a considerable advantage in judicial elections. Challengers argue that campaign contributions, the proverbial "mother's milk of politics," are essential to overcome the incumbent's advantage. Accordingly, when sitting judges consider any kind

of restriction on financial support, they may be accused of "protectionist" rules, an effort to protect their vested position and discourage any serious challenge. The opposite tendency can also be at work—an incumbent who expects substantial support from a particular interest group is loath to dissuade those supporters. These factors lead to a spiraling "arms race" in which competing interest groups invest more and more heavily in independent expenditures to elect justices they perceive as more sympathetic to their causes.

The Court should also make clear that states are free to set more stringent requirements than the limitations of the due process clause, so long as the financial support limits are high enough to permit a candidate to raise sufficient funds to mount a credible election campaign.

CONCLUSION

Amici uniformly believe that the participation of Justice Benjamin in this case created an appearance of impropriety. *Amici* ask the Court to be mindful of the three underlying realities of recusal decisions discussed in this brief: no judge can be totally impartial and objective in considering a request that the judge recuse based on financial support during an election campaign; due process is sufficiently flexible to adapt to new developments that threaten judicial impartiality; and, application of the due process clause to this case will allow state supreme courts to continue to develop rules to provide much-needed guidance for

recusal decisions based on financial support for a judge's election.

Respectfully submitted.

J. Mark White
William M. Bowen, Jr.
WHITE, ARNOLD
& DOWD, P.C.
2025 Third Avenue No.
Birmingham, AL 35203

(205) 323-1888

Charles K. Wiggins
Counsel of Record
WIGGINS
& MASTERS, PLLC
241 Madison Ave. No.
Bainbridge Island, WA 98110

(206) 780-5033

Counsel for *Amici Curiae*
Former Chief Justices and
Justices

No. 08-22

In The
Supreme Court of the United States

HUGH M. CAPERTON, *et al.*,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS

TIMOTHY J. BERG
President
AMERICAN ACADEMY OF APPELLATE LAWYERS
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
(602) 916-5000

WENDY COLE LASCHER
Counsel of Record
LASCHER & LASCHER
605 Poli Street
Ventura, California 93001
(805) 648-3228

GLORIA C. PHARES
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amicus Curiae

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BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioners.[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in

[1] Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. Although one of the counsel for the petitioners is a member of the Academy, he took no part in the decision whether to file this brief or in its preparation, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation.

The Academy takes no position with respect to any issue or argument presented other than those expressed in the Academy's own brief.

state and federal courts, dedicated to the improvement and enhancement of the standards of appellate practice, the administration of justice, and the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy currently has 286 member "Fellows." The activities of the Academy are supported entirely by the dues and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of lawyers, the Academy brings together the leading attorneys in the nation who devote their practices to appellate representation. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has previously filed an amicus curiae brief in this Court.[2]

The Fellows of the Academy offer comprehensive knowledge of the roles of state and federal appellate courts and the leadership role of those courts in the development of American law. The Academy is filing this amicus brief because it believes that the Court should consider how the due process and public policy consequences of a litigant's campaign contribution to

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[2] Brief of the American Academy of Appellate Lawyers Amicus Curiae Supporting Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004) (No. 03-1222).

a judge are magnified when the contribution is made to an appellate judge.

SUMMARY OF ARGUMENT

A lopsidedly large campaign contribution to a trial judge creates an appearance of impropriety and thereby raises concerns about deprivation of due process. When that contribution is made to one of the judges hearing an appeal those concerns are increased because of the institutional role appellate courts play in the judicial process. Appellate courts make law, interpret constitutions, and lead the judiciary in their jurisdictions. Bias or perceived bias influences not only the immediate case before the court but other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, results in the public's loss of respect for and confidence in the judicial system.

ARGUMENT

The Academy shares petitioner's view that in some circumstances the sheer size of a campaign contribution may result in a denial of due process. As the Court has noted, "[n]ot only is a biased decision-maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421

U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Academy wishes to emphasize that the effect of such unfairness is magnified in a case involving an appellate court, and to urge the Court to take that magnified effect into account when analyzing the due process concerns at issue here.

The judicial branch is under unprecedented attack in this decade. While "[e]veryone has a view regarding whether particular cases have been decided correctly . . . [p]ersistent attacks [on the judiciary] pose a problem because although courts will weather thoughtful criticism of specific judicial opinions, courts cannot survive a constant deluge of negative comments intended to undermine popular support for the entire judiciary." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court*, 8 Journal of Appellate Practice and Process 91, 93 (2006).

I. THE SEVERAL ROLES OF APPELLATE COURTS.

A disproportionately large campaign contribution to an appellate justice hearing an appeal involving that contributor threatens the judicial system in at least four ways.

A. THE LAWMAKING ROLE

Trial judges determine parties' rights one case at a time. While significant, to the extent a campaign

contribution influences the outcome of a trial, only the rights of the litigants before the court are at risk. But if a contribution to an appellate justice affects his or her reasoning about an appeal, then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of *stare decisis*. This is because, as every law student learns the first few days of law school, appellate courts establish what is the law.

Appellate opinions "collectively form the body of the common law" and "govern what a trial judge does, even if no appeal is ever taken in a particular case. . . ." Daniel J. Meador, Thomas E. Baker, Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* v (2nd ed. 2006) (hereafter "Meador"). Apart from litigation, the decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. As Justice Breyer put it more colloquially in reference to this Court, "we decide matters that affect not only the two people on either side in the case before us, but millions of people who are not present in the courtroom." Breyer, *supra*, at 98.

The text of the opinion deciding the case may have as much effect on future litigants and on people making business and personal decisions that depend on the state of the law as it does for the immediate parties to a case. The common law will develop and generations of future citizens will shape their

behavior and measure their rights based on the opinions appellate courts write today.

For that reason, *why* an appellate court decides a case a certain way is as important as *what* the court decides. When any outside factor taints appellate decisionmaking, it does not merely affect the outcome; it also distorts the process of explaining judicial reasoning – i.e., writing opinions – that is at the heart of an appellate court's mission. Therefore, the Court must look beyond the outcome of a particular case in evaluating when judicial campaign contributions necessitate recusal.

Nor can the Court assume that the prejudicial effect of a judicial campaign contribution to an individual justice is mitigated on appeal because decisions are made by a panel rather than by a single judge. Justice Jackson wrote, "I think it was Mr. Justice Brandeis who said that a judge often must decide a case as if he were 100% convinced one way or the other, although usually he is not more than 55% convinced. Many decisions prevail by a narrow margin of Justices, and the Justices admit a large margin of doubt." Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L.Q. 1, 13 (1951). To the extent that one justice is less than 100% certain of his or her views, a significant financial contribution or other outside influence that tips the scale for that one judge may have the effect of tipping the decision for the entire panel.

Thus, in addition to the due process implications for individual litigants, appellate courts must have effective mechanisms in place to avoid the untoward influence of excessive campaign contributions for the sake of every person whose actions and transactions are shaped in response to the decisions of appellate courts that develop the law and interpret statutes.

B. THE CONSTITUTIONAL ROLE.

This Court has noted that appellate courts play a key constitutional role arising from "[d]ifferences in the institutional competence of trial judges and appellate judges." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). Indeed, in several contexts, this Court has explained the importance of allowing appellate courts to review decisions *de novo*.

For example, "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)). Appellate courts must also examine independently whether historical facts amount to reasonable suspicion or to probable cause under the Fourth Amendment. *Ornelas v. United States*, 517 U.S. 690 (1996). In addition, appellate

courts decide *de novo* if punitive damage awards and fines are so excessive that they cross an "inherently imprecise" constitutional line. *Cooper Industries,* 532 U.S. at 434-35 (relying on *United States v. Bajakajian*, 524 U.S. 321, 336 (1997)).

Independent review helps to assure "'the uniform treatment of similarly situated persons that is the essence of law itself.'" *Cooper Industries*, 532 U.S. at 436 (quoting concurring opinion of Breyer, J., in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996)). Thus, when a campaign contribution or other extraneous factor influences an appellate justice, the "essence of law itself" is injured.

C. THE ERROR CORRECTING ROLE.

Not every action by an appellate court creates precedent or resolves a constitutional dispute, of course. Correcting trial court error is another important role played by appellate courts. Appellate oversight of trial courts brings consistency to the legal system as a whole not only in the constitutional arena discussed above, but with respect to state substantive and procedural law. That oversight must be exercised without bias.

In many matters, trial courts have broad discretion and their factual determinations receive great deference on appeal. That deference leads to a high rate of affirmance, and in consequence many trial court decisions are effectively final. Yet there is general recognition that the resolution of disputes by

a sole, fallible human being is not always a satisfactory method, especially where the decision-maker may be subject to local prejudices or voters' pressure. As a result, due process requires that, when trial court decisions are reviewed, they must be reviewed carefully to be sure they are free of improper influence and that such review itself is free from taint.

Further, in most states in the Union, there is a statutory or state constitutional right to appellate review, and most states provide intermediate appellate review that offers an additional layer of protection against trial court error. This is not true in West Virginia, however, where the Supreme Court of Appeals is that state's only appellate court, and its jurisdiction is entirely discretionary. Where the specter of bias is raised in such circumstances, the need for close scrutiny is critical.

D. THE LEADERSHIP ROLE.

"Apart from their case-deciding functions . . . appellate courts perform important roles in the governance and operations of the judiciary through their supervisory and rule making powers." Meador, *supra*, at vi. Appellate judges' statewide prominence means that they must display probity and evenhandedness more clearly than other judges. They set examples for the rest of the bench and bar. As Petitioners' brief makes clear (Pet. Br. at 26-28), the conduct at issue in this case has substantially jeopardized the role of the West Virginia Supreme Court

of Appeals as an exemplar of judicial independence and impartiality.

II. THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS IMPLICATES EACH OF THE INSTITUTIONAL CONCERNS SPECIFIC TO APPELLATE COURTS.

As long as states continue to elect judges, contributions to judicial campaigns will remain necessary. Drawing the line between permissible contributions and those requiring recusal may sometimes prove difficult. Nevertheless, the magnitude of Mr. Blankenship's contribution to Justice Benjamin's campaign is so great that it is easy to say it crossed the line of impropriety. That contribution affected all four appellate court roles discussed in Section I.

A. The contribution affected the law-making process. According to the petition, the decision of the West Virginia Supreme Court of Appeals created numerous new points of West Virginia law. Pet. Br. at 10.

B. The underlying judgment for petitioners included punitive damages. But for the fact that the Supreme Court of Appeals set aside the entire decision, the outcome would have touched on that court's constitutional role in the evaluation of punitive damages.

C. The error-correcting function was obviously affected. The West Virginia Supreme Court of Appeals is that state's only appellate court, and its docket is completely discretionary. Here, Justice Benjamin participated in the vote to grant Massey's petition for review, as well as in the eventual decision to reverse the judgment in its entirety. Since the initial appellate decision in West Virginia is a litigant's only avenue for review, the potential effect of bias was multiplied exponentially.

D. The decision clearly tarnished the leadership role of the Supreme Court of Appeals. One of the disturbing facts in this case is that after Justice Benjamin refused to recuse himself, Chief Justice Maynard and subsequently Justice Starcher recused themselves from further participation in the case.[3] This left Justice Benjamin in a position to appoint the two lower court judges to replace Justices Maynard and Starcher.[4] One of those judges was part of the 3-2

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[3] According to Petitioners (Pet. Br. at 11-12), Chief Justice Maynard recused himself after photographs showed him vacationing on the French Riviera with Justice Benjamin's campaign contributor, Don Blankenship, the chairman, CEO, and president of Respondent A.T. Massey, while the appeal of this case was pending. Justice Starcher also recused himself because of the effect on the appearance of impartiality arising from his public statements criticizing Mr. Blankenship's contributions to Justice Benjamin's re-election campaign. *Id.* at 13.

[4] Also according to Petitioners, Justice Benjamin was put in that position because, before their recusals, the three justices in the majority in the first opinion voted to ignore the procedures that would have put a fourth justice, Justice Albright, ahead of

(Continued on following page)

majority that reversed the judgment in favor of petitioners. Thus Mr. Blankenship's extraordinary campaign contributions to Justice Benjamin's campaign raised doubts not only about Justice Benjamin's impartiality, but also raised doubts about the impartiality of the majority of the court that decided the case.

This manipulation of the appointment process by a justice who refused to recuse himself is likely to breed cynicism not only in the eyes of the public, but among the entire West Virginia trial bench.

Justice Benjamin to succeed to the position of chief justice. Pet. Br. at 12 n.2.

CONCLUSION

The decision of the Supreme Court of Appeals of West Virginia should be reversed and remanded.

Respectfully submitted,

TIMOTHY J. BERG
President
AMERICAN ACADEMY OF
APPELLATE LAWYERS
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
(602) 916-5000

WENDY COLE LASCHER
Counsel of Record
LASCHER & LASCHER
605 Poli Street
Ventura, California 93001
(805) 648-3228

GLORIA C. PHARES
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amicus Curiae

January 5, 2009

MOTION

Supreme Court, U.S.
MOTION FILED

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Clerk

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MAR 3 2009

No. 08-22

In the Supreme Court of the United States

HUGH M. CAPERTON, ET AL.

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

EVAN M. TAGER
DAN HIMMELFARB
JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 262-1910

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 825-2335

Counsel for Respondents
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BEST AVAILABLE COPY

LEWIS F. POWELL III
RYAN A. SHORES
ROBERT W. LOFTIN
Hunton & Williams LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

D.C. OFFUTT, JR.
Offutt Nord, PLLC
P.O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Pursuant to Rules 25.5 and 25.6, respondents A.T. Massey Coal Co., et al., respectfully request leave to file the accompanying supplemental brief presenting the Court with information pertinent to this matter—specifically, a press release detailing Justice Benjamin's voting history in matters involving Massey Energy Company and its affiliates—that was issued by the West Virginia Supreme Court of Appeals after briefing was completed. Justice Benjamin's voting history in Massey cases bears significantly on respondents' contention that, even if the Due Process Clause requires recusal when there is a "probability of bias," there was no such probability here.

Respectfully submitted.

EVAN M. TAGER
DAN HIMMELFARB
JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 825-2335

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 262-1910

LEWIS F. POWELL III
RYAN A. SHORES
Hunton & Williams LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

D.C. OFFUTT, JR.
Offutt Nord, PLLC
P.O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

Counsel for Respondents

MARCH 2009

SUPPLEMENTAL BRIEF FOR RESPONDENTS

In our principal brief (at 5-6, 9, 50-51), we argue that, even if disqualification were constitutionally required when a judge felt a "debt of gratitude" to a litigant, and therefore harbored a "probability of bias" in its favor, Justice Benjamin's disqualification would not be constitutionally required, because (among other things) he voted against affiliates of Massey Energy Company (Massey) in numerous other cases. Two days ago, the West Virginia Supreme Court of Appeals released pertinent new information about Justice Benjamin's voting record that buttresses our argument.

According to a March 2, 2009 news release issued by the Supreme Court of Appeals' Public Information Office in response to press inquiries (App., *infra*, 1a-7a), available at http://www.state.wv.us/wvsca/press/cover.htm, Justice Benjamin has voted against Massey affiliates 81.6% of the time since taking office (App., *infra*, 2a). In decisions on the merits, on petitions for a writ of prohibition, and on petitions for appeal, Justice Benjamin has voted against Massey at least 15 times. *Id.* at 3a-7a. As the news release explains, of the five cases with "full written opinions of the Court" during this period, the only one in which Justice Benjamin has voted in Massey's favor is this case. *Id.* at 2a. In at least one of those cases, the conduct of Massey CEO Don Blankenship was at issue every bit as much as in the present case. See Pet. App. 19a-32a, *Massey Energy Co.* v. *Wheeling Pittsburgh Steel Corp.*, No. 08-218 (U.S. Sup. Ct.) (cert. denied Dec. 1, 2008).

The information in the news release was derived from the caseload system of the clerk's office of the West Virginia Supreme Court of Appeals and re-

viewed by lawyers who work for the court to ensure its accuracy. App., *infra*, 1a, 7a.

Respectfully submitted.

EVAN M. TAGER
DAN HIMMELFARB
JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 262-1910

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 825-2335

LEWIS F. POWELL III
RYAN A. SHORES
ROBERT W. LOFTIN
Hunton & Williams LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

D.C. OFFUTT, JR.
Offutt Nord, PLLC
P.O. Box 2868
949 Third Avenue
Suite 300
Huntington, WV 25728
(304) 529-2868

Counsel for Respondents

MARCH 2009

APPENDIX

Supreme Court of Appeals State of West Virginia

Administrative Office
1900 Kanawha Blvd., East
Bldg. 1, Room E-316
Charleston, West Virginia
25305
Web Site:
http://www.state.wv.us/wvsca
Information Services Division
Email:
Jennifer.bundy@courtswv.gov
Email:
April.harless@courtswv.gov

News

Public Information Officer
Jennifer Bundy - (304) 340-2305
April Harless - (304) 340-2306

FOR IMMEDIATE RELEASE:

March 2, 2009

CONTACT: Jennifer Bundy

(304) 340 - 2305

Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008

CHARLESTON, W.Va. – The following information was prepared by, and is being released by, the Public Information Office of the Supreme Court of Appeals of West Virginia. It was reviewed by lawyers who work for the Supreme Court to ensure its accuracy. It was prepared in response to press inquiries about Chief Justice Benjamin's voting record in cases involving Massey Energy.

As broken down below and detailed in the attached table of Massey Energy-related votes, during his first four years on the Supreme Court of Appeals of West Virginia, Chief Justice Benjamin voted in five cases which were determined by full written

opinions of the Court. He issued his own separate written opinions in three of those five cases. He also voted in three cases which sought writs of prohibition. And he voted in eleven petitions seeking full appellate review. In some of these cases, Massey Energy or its subsidiary was a petitioner/appellant. In others, Massey Energy or its subsidiary was the respondent/appellee.

Overall, Chief Justice Benjamin voted against the interests of Massey Energy or its subsidiary 81.6% of the time. Most of these votes occurred before the Caperton v. Massey Energy case was decided, and involve votes in cases which were decided by unanimous and non-unanimous votes of the Court. (Of course, in the rehearing of the Caperton case, Chief Justice Benjamin appointed two of the acting Justices after the recusal of Justices Maynard and Starcher and those two circuit judges split their decision, one voting for Massey and one voting against Massey.) According to information which was in the file or which was referenced in local news reports, all votes by Chief Justice Benjamin represented votes against the financial interests of Massey Energy of approximately $317 million.

Chief Justice Benjamin voted in favor of the interests of Massey Energy or its subsidiary 18.4% of the time. Of the five full written opinions of the Court during this time, the only case in which Chief Justice Benjamin voted in favor of Massey Energy's interests was in Caperton v. Massey. The Caperton case appears to have represented the third-highest value of the Massey cases in which Chief Justice Benjamin voted, behind Wheeling Pittsburgh Steel v Central West Virginia Energy (valued at approximately $220 million, without interest) and U.S. Steel

Mining Co., LLC v. Helton (valued at approximately $85 or more million).

The votes do not include such non-dispositive matters as votes on motions for time extensions, exceeding the page limitations on briefs, *pro hac vice* admissions, bifurcations, stays, etc. Identification of Massey subsidiaries was derived from Massey Energy's SEC filing, form 10-K, filed 02/29/2008, the most recent filing of its kind. Valuations, where available, are based upon representations of the parties or representations from media.

Chief Justice Benjamin Massey Energy-Related Votes

Full Written Court Opinions	4 Against	$ 90.5+ Million
	1 For (Caperton)	$ 50 Million
Petitions Seeking Prohibition Writs	3 Against 0 For	
Petitions Seeking Appeal	8 Against	$226.46 Million
	3 For	$ 3.46 Million
	1 For & Against	(later dismissed)
Total: 81.6% against Massey Energy	**15.5 Against**	**approx. $317 Million**
18.4% for Massey Energy	**3.5 For**	**approx. $53.5 Million** (includes Caperton)

Reported Court Decisions With Written Opinions - By Date

CHIEF JUSTICE BENJAMIN VOTES ON DISPOSITIVE MATTERS RELATED TO MASSEY ENERGY – 2005 - 2008					
Case Name – Docket No.					
Date	Type of Court Action	Court Vote	C.J. Benjamin Vote Related to Massey	Value to Massey (if known)	C.J. Benjamin Writing?
Summary:	Brief Summary of Matter				
REPORTED COURT DECISIONS WITH WRITTEN OPINIONS – BY DATE					
U.S. Steel Mining Co. LLC v. Helton – No. 32528					
12/03/2004	Full Written Opinion	3-1-1– Affirmed (Against Massey)	Against Massey*	approx $85+ million + $6 million/yr.	Concurrence & Dissent
Summary:	This case involving eleven coal companies questioned the application of several of West Virginia's coal severance taxes on mined coal destined for foreign markets. The taxes were based on the tonnage of coal mined. On 09/06/06 The Charleston Gazette estimated the case to be worth up to $500 million plus future annual tax assessments to the companies. Of the companies, Massey had perhaps the greatest tax exposure in view of the tonnage of coal it has mined in West Virginia. The majority opinion of the Court found all five taxes at issue to be constitutional. Chief Justice Benjamin issued a separate opinion in which he agreed with the majority on virtually all of the amounts in issue. He argued, however, that the minor aspect of the value added to the coal by its final loading for export was beyond the scope of two of the taxes at issue, but that such was quite small and could be easily remedied by a refund of nominal overpaid taxes. In a separate concurring opinion, J. Albright stated that the amount C.J. Benjamin referenced was simply the tax on the "relatively minimal cost of the mechanical act of scooping up and dumping the coal into the car." He stated that such an amount was "*de minimis*." * Except for such *de minimis* amount, C.J. Benjamin found entirely against the coal companies, including Massey.				
Helton v. Reed – No. 32991					
06/15/2006	Full Written Opinion	4-1 – Reversed (Ag. Massey)	Against Massey	$5.5 Million	Concurrence
Summary:	Massey subsidiary, Elk Run Coal Company, as Appellee, sought to maintain a refund ruling of $5.5 million of paid severance taxes. Massey subsidiary sought same favorable tax treatment as other coal companies who had benefitted from an error by the state Tax Commissioner. In a 4-1 decision, the Court reversed the circuit court (Kanawha County) which had found in favor of the Massey subsidiary. C.J. Benjamin wrote a separate concurrence in which he stated that he believed the majority relied too much on equity instead of an easy application of statutory law against the Massey subsidiary. J. Maynard issued a dissenting opinion.				
Davis, et al. v. Eagle Coal and Dock Company, et al. – No. 33054					
12/04/2006	Full Written Opinion	5-0 – Answered Question	Against Massey	Uncertain	None
Summary:	Massey was a defendant below and argued in favor of federal preemption by the federal Mine Safety and Health Act in case involving dust collection and roof bolters. The plaintiffs alleged that the dust collection systems failed to protect roof bolter operators from silica dust released during the machines' operations, and that any warning pertaining to silica dust as a result of operating the machines were inadequate. The circuit court certified a question to the WV Supreme Court of Appeals which answered the question in favor of the employees that such lawsuits could be filed and could remain in WV state courts. The case was appealed to the United State Supreme Court which refused to hear the case.				
Caperton v. A.T. Massey Coal, et al. – No. 33380					
11/13/2007	Full Opinion - *Withdrawn*	3-2 – Reversed – *W/D*	For Massey - *W/D*	*Withdrawn*	*Withdrawn*
01/01/2008	Full Written Opinion	3-2 – Reversed (for Massey)	For Massey	$50 Million	Concurrence
Summary:	Currently on appeal to the United States Supreme Court. In a 3-2 decision (J. Davis), the Court reversed the trial court (Boone County) on grounds of Forum Selection (Virginia) and *Res Judicata*. C.J. Benjamin and Judge Fred Fox II (sitting for J. Starcher) joined in the majority opinion. An earlier jury trial in Virginia on the actions raised in the plaintiffs' complaint resulted in a judgment against Massey of approximately $6 million. At issue in West Virginia was whether an additional action for more damages could proceed beyond the Virginia trial. The majority decision held that such a suit could not proceed in West Virginia in view of the Virginia action. The majority opinion focused on venue in light of a forum-selection clause in the applicable 1997 contract and on the principles of *res judicata*. The original 11/21/07 decision of the Court was withdrawn and the matter was reargued in 2008. C.J. Benjamin issued a lengthy concurring opinion on 07/28/08 on legal issues related to the majority decision as well as to the issue of recusal. J. Albright issued a dissenting opinion to which Judge Cookman (sitting for J. Maynard) joined. Based upon a filing in the case, the U.M.W.A. has a primary interest in any recovery.				

May v. Board of Review & Mate Creek Security – No. 33703						
	06/17/2008	Full Written Opinion	5-0 – Reversed (Ag. Massey)	Against Massey	Uncertain	None
	Summary:	Deborah May contended that she was compelled to quit her job as a personal maid to Don Blankenship because of mistreatment and changes in her job which had been made by Blankenship. She was denied unemployment compensation benefits on the grounds that she had left her job voluntarily without good cause. The circuit court upheld that administrative determination. The Supreme Court reversed and remanded the case with directions to award Ms. May unemployment compensation benefits.				
PETITIONS SEEKING GRANTING OF FULL REVIEW ON APPEAL – BY DATE						
McNeely v. Independence Coal Company, Inc. – No. 042166						
	05/09/2005	Refused Massey Petition	5-0 (Against Massey	Against Massey	$1 Million	None
	Summary:	Massey subsidiary sought full review of lower court verdict in favor of plaintiffs, the McNeelys. The couple had alleged a deliberate intent action against Independence Coal. The amount of the verdict was approximately $1 million. Chief Justice Benjamin voted with a unanimous Court to refuse the petition of the Massey subsidiary.				
Marfork Coal Co. v. Director, WV Dept. Of Environmental Protection and Janice Nease and Fredo Williams – No. 061011						
	11/08/2006	Granted Massey Petition (on selected issues only)	Issue 1: 3-2 (for Massey) Issue 2: 3-2 (for Massey)	For Massey Against Massey	Environmental	None
	Summary:	This action arose out of a WVDEP suspension of a Marfork Coal Co. surface mining permit. The Court remanded a previous appeal in this administrative appeal action on 10/25/2004 (before Chief Justice Benjamin was on the Court), with instructions that the substantive issues be considered. Marfork raised several assertions of error on this petition. Chief Justice Benjamin voted with a 3-2 majority to accept the petition on only one issue (Justices Davis and Albright would have refused on that assertion of error). Chief Justice Benjamin voted against the 3-2 majority on the other issue (Justices Albright and Benjamin would have refused on that assertion of error). Thus, Chief Justice Benjamin voted for Massey on one issue raised, and against Massey's subsidiary on another issue raised in this case. The case was later resolved and was dismissed on the joint motion of the parties.				
American Mining Ins. Co. v. Lightning Contract Services, Inc. and Alex Energy, Inc. v. United Nat'l. Group v. Lexington Ins. Co. – No. 062304						
	11/29/2006	Refused Ins. Co. Petition	5-0 (for Massey)	For Massey	Insurance Coverage	None
	Summary:	Chief Justice Benjamin joined a unanimous Court in refusing to grant the petition of American Mining Insurance Company. The insurance company sought an appeal of a summary judgment ruling of coverage in favor of Massey Energy subsidiary, Alex Energy. The case stemmed from a declaratory judgment action where American Mining argued that it was not obligated to defend or indemnify Lighting Contract Services and Alex Energy in an employment-related claim under the Commercial General Liability Policy.				
Birchfield v. Independence Coal Co., Inc. d/b/a Progress Coal Co., Massey Energy Co., et al. – No. 060451						
	09/15/2006	Refused Massey Petition	4-0 (Against Massey)	Against Massey	Uncertain Death Case	None
	Summary:	Massey petition sought review of certified question about a deliberate intent cause of action involving the deaths of two miners of Progress Coal Company on 09/17/2003. The requested certified question concerned whether Massey could be sued based upon a violation of its own safety manual. The circuit court ruled that it could. The Supreme Court of Appeals refused the petition and the case was settled on remand. Justice Davis was disqualified in this matter.				
Osten v. Massey Coal Services, Inc. – No. 061853 *Osten v. Massey Coal Services, Inc.* – No. 061854						
	01/24/2007 01/24/2007	Refused Plaintiffs' Petition Refused Massey Petition	3-1 (Against Massey) 3-1 (Against Massey)	Against Massey For Massey (2 issues)	$3.46 Million $3.46 Million	None None
	Summary:	Plaintiffs below (No. 061853) and Massey (No. 061854) sought to appeal from circuit court verdict and various post-trial motions and for post-trial discovery. The case alleged that Massey's mining operations had damaged or destroyed water wells and water supplies, caused subsidence or settlement damage and that the company did not provide an adequate supply of replacement water. Chief Justice Benjamin was the only justice to vote to grant both plaintiffs' and Massey's petitions (though he would only hear two of the issues raised by Massey). Justice Davis was disqualified in these two matters.				
Brown v. Rawl Sales and Processing Co. and Massey Energy Co. – No. 070089						
	09/11/2007	Refused Massey Petition	5-0 (Against Massey)	Against Massey	Required Services	None
	Summary:	Appeal by Massey from a Mingo County Circuit Court order which had ordered Massey to provide water to certain Mingo County residents. Water users of Rawl, Lick Creek, Merrimac and Spragg had alleged that the injection of coal mine slurry into an abandoned underground mine and the operation of an above-ground slurry impoundment had contaminated water wells. The Supreme Court refused the appeal petition.				

Jackson v. Power Mountain Coal Co. – No. 073598						
	04/28/08	Refused Plaintiff Petition	3-2 (for Massey)	Against Massey	New Trial Sought	None
	Summary:	Plaintiff sought a full appellate review of circuit court order which denied his motion for a new trial on the issue of damages and his motion to set aside the jury verdict and award a new trial on damages. Plaintiff asserted that the jury's verdict of compensation damages was inadequate to fully and fairly compensate him in light of uncontroverted evidence of harm (near amputation-type injury). The Supreme Court of Appeals refused the plaintiffs' petition. Chief Justice Benjamin voted in the minority to grant the plaintiff's petition (against Massey's interests).				
Timmermeyer v. Goals Coal Company and Coal River Mountain Watch – No. 34158						
	04/15/2008	Granted CRMW Petition	4-1 (Against Massey)	Against Massey	Environmental	None
	Summary:	Coal River Mountain Watch appeals from the circuit court's final order affirming the decision of the Surface Mine Board in this administrative appeal. Respondent, Goals Coal Company, sought to build a coal storage silo within three hundred feet of an elementary school, and the Surface Mine Board concluded that the proposed site was within the permit area of the relevant permit. Chief Justice Benjamin voted with the 4-1 majority to accept the petition of Coal River Mountain Watch. The case is scheduled to be argued before the Supreme Court of Appeals on 04/08/2009, though Chief Justice Benjamin has temporarily recused himself from cases involving Massey Energy interests while the Caperton case is pending before the United States Supreme Court of Appeals.				
Wheeling Pittsburgh Steel Corp. & Mountain State Carbon, LLC v. Central West Virginia Energy Co. & Massey Energy Co. – Nos. 080183 & No. 080192						
	06/25/2008	Refused Massey Petition	5-0 (Against Massey)	Against Massey	$220 Million	None
	Summary:	Two separate petitions seeking full appellate review by Massey and its subsidiary of July 2007 Brooke County Circuit Court jury verdict which awarded $220 million, plus interest, to Wheeling Pittsburgh Steel and one of its subsidiaries. Wheeling Pittsburgh Steel accused Massey of improperly diverting coal which should have been delivered to it under its contract to markets which were more profitable for Massey. Massey and its subsidiary were accused of breach of contract and fraud. The refusal to accept the petition let stand the verdict. The case was appealed to the United States Supreme Court. On 06/25/2008, Massey sought a stay of the Court's mandate pending its appeal to the United States Supreme Court. That stay was granted on a 3-2 vote, with Chief Justice Benjamin voting in the minority against Massey (would have refused the stay).				
Burns v. Independence Coal Co., Inc. – No. 081402						
	11/13/2008	Refused Massey Petition	4-1 (Against Massey)	Against Massey	$2 Million	None
	Summary:	Massey subsidiary, Independence Coal Company, sought to appeal its post-trial motions after an adverse jury verdict in an employment case. The jury found that the company wrongfully discharged plaintiff Burns in retaliation for his making complaints about workplace safety. Independence argued that inadmissible evidence overshadowed the real issues at trial and prejudiced the jury, that the jury's finding on this count was unsupported by the evidence, and that the damages awarded were unreasonable and unsupported by the evidence. The jury awarded a total of $1,999,554 to plaintiff, which included $1 million in punitive damages. Chief Justice Benjamin joined the 4-1 majority which decided we, to grant Independence Coal's petition.				
PETITIONS SEEKING EXTRAORDINARY RELIEF THROUGH PROHIBITION – BY DATE						
Central West Virginia Energy Company v. Gaughan – No. 082707						
	01/17/2008	Prohibition Writ Denied	5-0 (Against Massey)	Against Massey	Procedural	None
	Summary:	Massey subsidiary sought a writ of prohibition challenging an order of the circuit court requiring disclosure of non-public prices of metallurgical coal sold or projected to be sold by it and its non-party affiliates to non-parties. Chief Justice Benjamin joined the 5-0 Court which refused to grant the requested extraordinary relief.				
SER Independence Coal Co. v. Hohe – No. 071698						
	06/06/2007	Prohibition Writ Denied	4-0 (Against Massey)	Against Massey	Procedural	None
	Summary:	Independence Coal, a Massey subsidiary, sought to prohibit the enforcement of a circuit court order which had denied its motion to consolidate three cases for trial. Chief Justice Benjamin joined the 4-0 Court, which refused to grant the requested extraordinary relief. Justice Davis was disqualified in this matter.				
SER Central West Virginia Energy Co. v. Wilson – No. 34498						
	10/23/2008	Prohibition Writ Dismissed	5-0	Against Massey	Procedural	None
	Summary:	Massey subsidiary, Central West Virginia Energy, sought a writ of prohibition related to an order in circuit court which it claimed "grant[ed] relief which is largely dispositive of every issue in the case." The matter was dismissed on 10/23/2008 as moot after the circuit court scheduled a hearing on the matter on 11/05/2008. Central West Virginia Energy, by motion of 10/22/2008, opposed the dismissal based on mootness.				

Disclaimers: This list was compiled by use of a list of Massey subsidiaries obtained from Massey Energy's SEC filing, form

10-K, filed 02/29/2008 – the most recent filing of its kind. Each name listed was compared with the Clerk's Office Caseload system, using the broadest possible search.

Nothing prior to January 1, 2005, when Chief Justice Benjamin joined the Court, was considered.

Only final, or dispositive, votes of a matter are listed. Miscellaneous motions, *pro hac vice* motions, stays, motions to exceed page limitations, and other underlying motions are not listed.